SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, APPELLANTS

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

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1a In the Court of Common Pleas of Allegheny County, Pennsylvania

No. 1560, July Term, 1942

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

IN RE APPEAL OF MESTA MACHINE CO.

from

ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS, AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

Appearance Docket Entries

May 22, 1942, Appeal. Petition & Afft. filed May 20, 1942, Petition presented in open Court & an Appeal is ordered to be filed & Notice to be given to the Solicitor of Allegheny County.

Sept. 16, 1942, Amended petition for appeal from Tax Assessment presented in open Court allowed and ordered filed.

Sept. 16, 1942, Petition presented in open Court and a rule is granted upon County of Allegheny to show cause why leave should not be granted to the United States of America to intervene in this proceedings: returnable sec. reg.

Sept. 22, 1942, Answer of Allegheny County filed.

Oct. 19, 1942, Rule is hereby made absolute and United States of America is hereby allowed to intervene in above appeal.

2a Eo die, Exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County and bill sealed.

Nov. 4, 1942, Praecipe for Issue filed. (2008.)

Nov. 25, 1942, it is ordered that testimony taken be transcribed and filed of record. Eo die, Testimony lodged.

Dec. 9, 1942, Testimony filed.

Jan. 18, 1943, after the Taking of testimony & the hearing of arguments & upon consideration thereof the appeal is sustained, the Assessment of the Machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the Machinery of the Mesta Machine Co. is reduced from 2,489,085.00 to 1,871,085 Dollars. The County of Allegheny is ordered to pay the costs of this proceeding. Eo die, Exception noted to the Board of Property Assessment, Appeals and Review of Allegheny & bill sealed. Eo die, Opinion filed.

February 2, 1943, Certiorari in appeal ex parte Deft. to Supreme Court filed.
February 5, 1943, Notice filed.
Feb. 10, 1943, Notice Acceptance of Service filed.
From the Record.

[SEAL] WM. H. FRASHER,
Prothonotary.

3a In Court of Common Pleas of Allegheny County

Appeal from tax assessment and amended petition for hearing

Filed September 16, 1942

To the Honorable, the Judges of said Court:

The petition of Mesta Machine Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, respectfully represents:

1. Your petitioner is the owner of a tract of land situated in the Borough of West Homestead, Allegheny County, Pennsylvania, whereon it maintains a large plant devoted to the manufacture of rolling mill and other kinds of machinery. Said land and the buildings thereon are customarily assessed for taxation in the name of your petitioner.

2. On October 30, 1940, your petitioner contracted with the United States of America (hereinafter called the Government) to manufacture for it a quantity of large guns, over a considerable period of time. To enable your petitioner to produce said guns, the Government during the year 1941 caused to be purchased and/or produced, and to be installed at your petitioner's said plant, a considerable quantity of machinery and machine tools, such as lathes, planes, grinders, presses, shapers, milling machines, and cranes. All of said machinery and machine tools were and are the sole property of the Government, and by the terms of the contract of October 30, 1940, the Government has leased the same to your petitioner for use in the manufacture of the guns aforesaid for a nominal rental of One Dollar, and your petitioner is

4a obligated, upon termination or completion of performances of said contract to remove such machinery and machine tools from its premises and redeliver the same unto the Government.

3. Said machinery and machine tools are not permanently affixed to the real estate of your petitioner and your petitioner has no title to said machinery and machine tools or to any portion thereof, notwithstanding they are located presently upon its said

real estate; and the Government, being the sole owner of said machinery and machine tools, has no right, title, or interest whatever in the real estate of your petitioner upon which said machinery and machine tools are now located.

4. On or about January 1, 1942, the Board of Property Assessment, Appeals, and Review of Allegheny County revised the then existing assessment or valuation of your petitioner's real estate in the Borough of West Homestead, as the same had been fixed in the triennial assessment for the years 1940, 1941, and 1942 by adding thereto all of said machinery and machine tools so belonging to the Government and assessing and valuing the same in the total sum of $618,000. Attached hereto and made part hereof as Exhibit 1 (see County's Exhibit C, R. p. 65a et seq.) is a true and correct itemized list of the machinery and machine tools so additionally assessed to your petitioner, with the respective amounts at which the same have been assessed and valued as aforesaid.

5. On February 5, 1942, the date set by the Board of Property Assessment, Appeals, and Review for hearing objections
5a to such additional assessment, your petitioner appeared before said Board, fully advised said Board of the facts herein set forth, and made objection to the addition of said machinery items to its 1942 assessment. On April 20, 1942, said Board notified your petitioner that it had decided unanimously to maintain said 1942 machinery assessment of $618,000 against your petitioner.

6. On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board of Property Assessment, Appeals, and Review heard objections by Mesta Machine Company and the United States of America to the assessment and gave further consideration to the questions involved. On July 30, 1942, the Board of Property Assessment, Appeals, and Review gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery assessments totaling $618,000 assessed as on the property and in the ownership of Mesta Machine Company.

7. Your petitioner is advised, believes and therefore avers that the said assessment is illegal and void for the reasons that:

a. The action of the Board of Property Assessment, Appeals, and Review, in including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, is illegal and without authority of law.

b. Said machinery and machine tools are not real estate of Mesta Machine Company within the meaning of the laws
6a of the State of Pennsylvania relating to assessment and taxation of real property.

c. The assessment is made upon or with respect to machinery and machine tools which are the sole property of the United States and are immune under the Constitution of the United States from taxation by the State of Pennsylvania, either to Mesta Machine Company or to the United States.

d. Said assessment and the taxes exacted thereunder are imposed upon property which is an instrumentality of the United States and constitute a direct and unconstitutional burden upon the United States.

e. If the laws of Pennsylvania properly construed and applied purport to authorize the assessment and taxation of said machinery and machine tools belonging to the United States, said laws are in violation of the Constitution of the United States, and are therefore invalid.

f. The Board of Property Assessment, Appeals, and Review, by including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, has applied the provisions of the laws of the State of Pennsylvania relating to the assessment and taxation of real property in a manner which renders said law invalid under the Constitution of the United States.

8. Your petitioner being dissatisfied with the assessment of its property, hereby appeals from the assessment for the year 1942 of property in the Borough of West Homestead, made
7a against it by the Board of Property Assessment, Appeals, and Review, insofar as there is included therein the aforesaid items of machinery and machine tools belonging to the United States of America.

Wherefore, your petitioner respectfully prays your Honorable Court to hear and determine this, its appeal.

And it will ever pray, etc.

MESTA MACHINE COMPANY,
By FRANK A. MESTA,
Vice President.

[*Duly sworn to by Frank A. Mesta; jurat omitted in printing.*]

Order of Court

And now, September 16th, 1942, the foregoing amendment is allowed and ordered to be filed.

By the Court,

H. R., *J.*

8a In Court of Common Pleas of Allegheny County

Petition of the United States for leave to intervene and intervening petition and order

Filed September 16, 1942.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania:

The United States of America, by Samuel O. Clark, Jr., Assistant Attorney General of the United States, and Charles F. Uhl, United States Attorney for the Western District of Pennsylvania, respectfully alleges that it is interested in the outcome of this appeal and desires to become a party thereto by uniting with the appellant in furtherance of its claim, and as grounds therefor alleges and shows that:

1. The intervention for which leave is herein prayed is authorized by the Attorney General of the United States at the request of the Secretary of War.

2. Mesta Machine Company is a corporation organized under the laws of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania.

3. The board of Property Assessment, Appeals, and Review of Allegheny County is the body charged by law with the duty of making, or causing to be made, all assessments and valuations of real property within said County for the purpose of County, City, Borough, Town, Township, and School taxation.

9a 4. On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States of America to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto which are true and correct, except that there has been deleted therefrom certain figures not material to the present controversy, which in the public interest should not be disclosed, are attached hereto and made a part hereof.

5. To enable Mesta Machine Company to produce said guns the United States, under the terms of said contract, during the year 1941, caused to be produced certain machinery and machine tools and purchased the same and caused the same, together with other machinery and machine tools which were in possession of the United States, to be installed in a building owned by Mesta Machine Company and located in the Borough of West Homestead,

County of Allegheny. A list of all said machinery and machine tools, marked "Exhibit B" (see County's Exhibit C, R. p. 65a et seq.) is attached to the petition of Mesta Machine Company filed with this Court, in this Appeal, which list is incorporated herein by reference and made a part hereof.

6. All of said machinery and machine tools were the property of the United States prior to installation in the building of Mesta Machine Company, and are now and at all times since have been the property of the United States.

10a 7. Said machinery and machine tools were not permanently affixed to the real property of Mesta Machine Company, but were leased to Mesta Machine Company at a nominal rental for the period of the said contract, and for the sole purpose of use in the manufacture of said guns.

8. Mesta Machine Company has no title to said machinery and machine tools, or any portion thereof, and is bound by the terms of the contract to remove said machinery and machine tools from its plant within 90 days after termination of the contract, and to return the same to the United States, in good condition, wear, tear, and depreciation excepted.

9. On or about January 1, 1942, the Board of Property Assessment, Appeals, and Review of Allegheny County revised the then existing assessment and valuation of the real estate of Mesta Machine Company in the Borough of West Homestead, County of Allegeheny, as the same has been fixed in the triennial assessment for the years 1940, 1941, and 1942, by adding thereto all of said machinery and machine tools belonging to the United States, and assessed and valued the same in the total sum of $618,000. An itemized list of the machinery and machine tools so additionally assessed to Mesta Machine Company, marked "Exhibit 1," showing the amounts at which each of the same has been assessed and valued is attached to the petition of Mesta Machine Company filed with this Court, in this Appeal, and has been incorporated herein and made a part, hereof by reference by paragraph 5 above.

11a 10. On February 5, 1942, the date set by the Board of Property Assessment, Appeals, and Review for hearing objections to such additional assessment, Mesta Machine Company appeared before said Board, fully advised said Board of the facts herein set forth, and made objections to the assessment of the said machinery and machine tools in its 1942 assessment.

11. On April 20, 1942, the Board of Property Assessment, Appeals, and Review notified Mesta Machine Company that it had decided unanimously to maintain the assessment to Mesta Machine Company of the value of said machinery and machine tools fixed at $618,000.

12. On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board of Property Assessment, Appeals, and Review heard objections by Mesta Machine Company and the United States of America to the assessment, and gave further consideration to the questions involved. On July 30, 1942, the Board of Property Assessment, Appeals, and Review gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery assessments totaling $618,000 assessed as on the property and in the ownership of Mesta Machine Company.

13. The said assessment is illegal and void for the reasons that:

a. The action of the Board of Property Assessment, Appeals, and Review, in including said machinery and machine tools
12a belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, is illegal and without authority of law.

b. Said machinery and machine tools are not real estate of Mesta Machine Company within the meaning of the laws of the State of Pennsylvania relating to assessment and taxation of real property.

c. The assessment is made upon or with respect to machinery and machine tools which are the sole property of the United States and are immune under the Constitution of the United States from taxation by the State of Pennsylvania, either to Mesta Machine Company or to the United States.

d. Said assessment and the taxes exacted thereunder are imposed upon property which is an instrumentality of the United States and constitute a direct and unconstitutional burden upon the United States.

e. If the laws of Pennsylvania properly construed and applied purport to authorize the assessment and taxation of said machinery and machine tools belonging to the United States, said laws are in violation of the Constitution of the United States, and are therefore invalid.

f. The Board of Property Assessment, Appeals, and Review, by including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, has applied the provisions of the laws of the State of Pennsylvania relating to the assessment and taxation of real property in a manner which
13a renders said law invalid under the Constitution of the United States.

14. Under the terms of its contract the United States will be required to reimburse Mesta Machine Company for the amount of any taxes which it might be required to pay upon the valuation of said machinery and machine tools, and the entry of a judgment

upholding such assessments will impose a liability upon the United States to reimburse Mesta Machine Company in equal amount.

15. The determination of the Appeal of Mesta Machine Company may affect the legally enforceable interests of the United States, whether or not it would be bound by a judgment in this action.

Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this action, but an order be entered allowing intervention, and that this Petition for Leave to Intervene be considered and adopted by this Court as the Intervening Petition of the United States. Your petitioner further prays that judgment be entered herein determining that said machinery and machine tools are the property of the United States and may not be assessed or taxed, that the assessment made upon the said machinery and machine tools, and the value thereof, by the Board of Property Assessment, Appeals, and Review is illegal, void, and of no effect, and for such other and further relief as to this Court may seem proper.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.

14a [*Duly sworn to by Charles F. Uhl; jurat omitted in printing.*]

Order of Court

Now, to wit, September 16th, 1942, the foregoing petition having been presented in open court, it appearing that notice of said presentation has been given to the County Solicitor of Allegheny County, a rule is granted upon County of Allegheny to show cause why leave should not be granted to the United States of America to intervene in the above-entitled proceeding; returnable, sec. reg.

By the Court.

H. R.

15a In Court of Common Pleas of Allegheny County

Answer of the County of Allegheny to the Petition of the United States for Leave to Intervene

Filed September 22, 1942

And now comes the Board of Property Assessment, Appeals, and Review of Allegheny County, by Walter P. Smart, County Solicitor, and for answer to the petition of the United States for leave to intervene, submits the following:

First. The averments of fact set forth in the petition do not require an answer for the reason that said averments are not relevant or material to the issue involved in the petition, to wit, the right of the United States to intervene in an appeal of the Mesta Machine Company from an additional real estate assessment made by the Board of Property Assessment, Appeals, and Review of the County of Allegheny.

Second. In further answer to said petition to intervene the County of Allegheny avers that the right of appeal from a property assessment is not an absolute right but a right derived from the statutory law allowing and authorizing such an appeal by the property owner and the County further avers that the appellant property owner cannot, by reason of a contractual relationship with a third party, extend to that third party, in this case the United States, the statutory right of appeal.

Third. The additional assessment which is the basis for this appeal was made against the Mesta Machine Company as the owner of the property and every issue of fact or law that
16a the United States might raise at the hearing of this appeal can be raised by the Mesta Machine Company.

Wherefore your Respondent prays your Honorable Court that the rule to show cause why the United States should not be allowed to intervene be discharged.

COUNTY OF ALLEGHENY,
By WALTER P. SMART,
County Solicitor.

In Court of Common Pleas of Allegheny County

Opinion and Order

Filed October 19, 1942

Opinion by ELLENBOGEN, J.

The Board of Property Assessment, Appeals, and Review of Allegheny County increased the ad valorem property taxes of the Mesta Machine Company for the year 1942 by including therein the value of certain additional machinery which had recently been installed in its plant in West Homestead Borough, Allegheny County, Pennsylvania. Upon refusal of the Board to rescind this assessment, the Mesta Machine Company, on May 20, 1942, filed an appeal in this Court. On September 16, 1942, by leave of court, it filed an amended petition of appeal. It is averred in this petition that title to certain machinery located in its plant and assessed by the Board of Property Assessment at $618,000.00 is not in the Mesta Machine Company but is in the United States of America and that said machinery is therefore

immune from taxation by the State of Pennsylvania or its municipal subdivisions, under the provisions of the Constitution of
17a the United States. The appeal asks that the assessment be vacated and set aside.

On September 16, 1942, at the request of the Secretary of War and at the direction of the Attorney General of the United States, the United States of America by S. O. Clark, Jr., Assistant Attorney General of the United States, and Charles F. Uhl, United States Attorney for the Western District of Pennsylvania, filed a petition praying for leave to intervene in this appeal, and a rule was granted upon the Board of Property Assessment to show cause why the United States of America should not be permitted to intervene in the appeal.

On September 22, the Board of Property Assessment, Appeals, and Review of Allegheny County, filed an answer to the petition to intervene in which it did not deny the averments of fact contained in the petition of the United States, but averred that the assessment having been made against the Mesta Machine Company and not against the United States of America, the United States should not be permitted to intervene. This answer is in effect a demurrer to the petition. In view of the failure of the Board of Property Assessment to deny the averments of fact contained in the petition of the Government, these averments must be considered as having been admitted. The oral argument before the court en banc and the briefs filed with us are based on that assumption.

The only question before us is the narrow legal question whether the United States of America has such an interest in the appeal that it should be permitted to intervene. The admitted facts are as follows:

18a The Mesta Machine Company, appellant, is a corporation organized under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania. It is the owner of a large tract of land located in said Borough on which it maintains a large industrial plant devoted to the manufacture of heavy machinery used for the equipment of steel mills and elsewhere. Said tract of land and the buildings erected thereon, including the machinery located therein, have customarily been assessed for taxation by the County of Allegheny and the Borough of West Homestead in the name of the Mesta Machine Company.

On November 1, 1940, the Mesta Machine Company entered into a contract with the United States of America under which it undertook to manufacture for the United States a quantity of

large field guns. To enable the Mesta Machine Company to manufacture the guns, and as a part of its contract entered into with the United States, the United States purchased or caused to be produced, and installed at the plant of the Mesta Machine Company in West Homestead, special machinery and machine tools such as lathes, planers, grinders, presses, shapers, milling machines, and cranes. Under the contract the machinery, tools, and other equipment are owned by the United States but are leased to Mesta Machine Company for a fee of $1.00. The contract between the United States and the Mesta Machine Company contains, inter alia, this provision:

19a Article I–D

"1. The Contractor shall be reimbursed in the manner hereinafter described for----------

(g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

Title III, Article III–E–1 (b) also contains a clause which provides that certain taxes should be reimbursed to the Mesta Machine Company, but we are not considering this clause, because, in our opinion, it refers to "transaction" taxes, popularly known as "sales" taxes and not to real property taxes.

20a It seems clear from a reading of Article I–D (g that the United States of America will be required to reimburse Mesta Machine Company for any real estate or local tax which Mesta Machine Company will be required to pay upon the property of the United States located in the Mesta Machine Company plant. The United States has freely admitted this obligation.

Counsel for the Government has called our attention to the fact that the United States of America has similar arrangements with other corporations in the County of Allegheny which manufac-

[1] Title III, Article III–E–1 (b):
"State, County, and Municipal Taxes.—The contract prices as stated in Article III–D herein do not include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county, or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated."

ture war material for the Government with machinery owned by the United States and leased to these corporations which are valued at large sums of money. We have been advised that this is a test case not only for Allegheny County but throughout the United States of America and that local taxes on property valued at billions of dollars owned by the United States and leased to manufacturers of war materials are involved.

The issue now before us is the preliminary question whether under these facts the United States of America, who must ultimately pay the taxes involved if the assessment is sustained, should be permitted to intervene and contest the validity of the assessment.

It is contended by the United States but denied by the Board of Property Assessment that the Government has the right to intervene under Rule 2327 of the Pennsylvania Rules of Civil Procedure. In their brief counsel for the Board of Property Assessment strenuously contend that the Pennsylvania Rules of Civil Procedure do not apply.

21a We are unanimous in our opinion that we should permit the United States of America to intervene and have arrived at this opinion without taking into account Rule 2327.

While the assessment of these taxes is against the Mesta Machine Company and not against the Government, the real party in interest is the United States of America, because, under its contract with the Mesta Machine Company, it must reimburse the Company if the assessment is sustained and the tax collected. Therefore, equity and justice require that the United States be given a day in court, that it be directly represented and be permitted to contest the validity of the assessment by its own counsel instead of being obliged to depend upon the Mesta Machine Company who may have no real interest in the outcome of this appeal. Moreover, as we have already pointed out, it is not merely an assessment upon machinery in the sum of $618,000.00 which is involved here, but this is a test case which will involve the assessment of local taxes upon billions of dollars of Government-owned property. The contract before us was evolved by the necessities of a war of global proportions and represents a departure from methods previously used by the Government to obtain its ordnance.

If the contention that the Pennsylvania Rules of Civil Procedure do not apply is valid, then the question of intervention is within the sound discretion of this Court: Tonkonogy v. Levin, 106 Pa. Superior Ct. 448, and we have no hesitation to exercise this discretion in favor of the United States of America, because we are clearly of the opinion that the public interest and

22a sound public policy require us to permit the Government to intervene in the appeal before us.

The contention of counsel for the Board of Property Assessment, so ably presented in their brief, that the right of appeal from an assessment of real estate taxes is governed by the Act of Assembly of June 21, 1939, P. L. 626, which allows an appeal only by the "taxpayer" and that the United States has no right to appeal because the Mesta Machine Company is the taxpayer and not the United States, has no force on the question of intervention. The United States is not attempting to appeal from this assessment, but is only asking to be permitted to intervene in the appeal of the taxpayer, the Mesta Machine Company, so that the Government may have an opportunity to appear in Court and contest the validity of the assessment of taxes which, if sustained, it must pay. The Act of 1929 which provides that a taxpayer may appeal from the final assessment does not deprive this Court of its inherent power to permit the intervention of the real party in interest whenever we believe that sound policy so requires.

There is still another reason why this petition to intervene must be granted and that is Rule 2327 of the Pennsylvania Rules of Civil Procedure. This rule reads as follows:

"Rule 2327. Who may Intervene.

"At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

"(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such per-
23a son to indemnify in whole or in part the party against whom judgment may be entered; * * *"

The United States of America must indemnify the Mesta Machine Company for any judgment entered in the proceedings before us, and thus the Government is directly within the terms of this rule. But the Board of Property Assessment, Appeals and Review of the County of Allegheny contends that this rule does not apply because an appeal from an assessment by the Board is not an "action" as this term is used in the rule. It contends that an appeal from its assessment to this Court is a "special proceeding" and not inherently a judicial proceeding, citing 1 C. J. S. 1093, and Philadelphia Company's Petition, 210 Pa. 490. Rule 2326 defines "action" as follows:

"As used in this chapter 'action' means any civil action or proceeding at law brought in or appealed to any court of record which is subject to these rules."

The appeal pending in this Court is clearly a "proceeding at law * * * appealed to any court of record * * *", and thus subject to the Civil Rules of Procedure. When such appeal

is heard in this Court it is heard de novo subject to our rules of evidence and in accordance with our usual and customary procedure.

We hold that the Pennsylvania Rules of Civil Procedure apply to this appeal and that they require that the United States of America be permitted to intervene.

Since it has been urged upon us that to permit the United States of America to intervene in this appeal might be in-
24a. terpreted as a precedent for the intervention of conditional vendors, mortgagees, and other lienees of heavy machinery installed in manufacturing plants, we state that this opinion is not intended and should not be taken as a precedent for such intervention, but has application only in the peculiar and particular circumstances of the case at bar. It will also be clear that in this opinion we have only dealt with the right of the United States of America to intervene in the pending appeal, and not with the question whether the assessment of the Board of Property Assessment, Appeals, and Review of the County of Allegheny is valid or contrary to law. That is an issue which will be determined when this appeal is heard.

Order

And now, to wit, this 19th day of October A. D. 1942, the rule to show cause heretofore granted is made absolute and the United States of America is hereby allowed to intervene in the appeal pending at the above-mentioned number and term.

By the Court.

Ell.

Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

[SEAL] HENRY ELLENBOGEN, *Judge.*

25a In Court of Common Please of Allegheny County

Statement of Evidence

PITTSBURGH, PA.,
Thursday, November 19, 1942.

Coram: Hon. HENRY ELLENBOGEN, J.

Counsel present: Carl F. Glock, Esq., for Mesta Machine Company. Paul F. Mickey, Esq., for U. S. Dept. of Justice, for the Appellants. Harry M. Montgomery, Esq., for County of Allegheny, for the Appellee.

The COURT. What is this to be, a final hearing?

Mr. GLOCK. If the Court please, I am uncertain about that. I thought it was to be a Pre-Trial conference. We have been trying to get together with the County on a stipulation of facts. We believe ninety-five percent of the case can be offered in a stipulation of facts. We came here today thinking this was to be a Pre-Trial conference to determine what stipulation can be reached.

The COURT. I thought it was purely a question of law.

Mr. GLOCK. I think it is.

26a The COURT (to Mr. Montgomery). Will you so agree?

Mr. MONTGOMERY. We discussed the stipulation that is prepared and came to the conclusion we do not want to stipulate as to the facts set forth in the prepared paper. In the first place, we object to the admissibility of all of the facts that are involved.

The COURT. They may not be admissible, but if they are facts they are facts. The question of admissibility is a question of law.

Mr. MICKEY. We didn't think there was any fact that was at issue. If there is any fact that is at issue perhaps we can adjust that right now. There certainly wouldn't be more than one or two.

Mr. MONTGOMERY. I don't believe the County would execute that. Maybe I can get along if you read into the record the Statement paragraph by paragraph and doing it in that fashion rather than just signing a stipulation.

The COURT. Let us do that and this is a final hearing on the case.

Mr. MONTGOMERY. Any facts I won't admit as we go along or any changes in them that necessitate additional evidence I presume you reserve the right to submit it later and anything I am to deny I want to contest and reserve the right to offer some evidence on that.

Mr. GLOCK. We are willing to proceed with this case to-
27a day as if a fiinal hearing subject to bringing in testimony not admitted by the County.

The COURT. Let's go ahead.

Mr. MICKEY: Wouldn't it be better to resolve any facts before we read them?

The COURT. Mr. Montgomery seems to be in the position where he is not authorized to sign any stipulation. As you go along, if he does not agree he will object.

Mr. MONTGOMERY. I may object to the admissibility.

J. VINCENT SEXTON, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. What is your name?

A. J. Vincent Sexton.

Q. What is your office?

A. Office manager and chief clerk, Board of Property Assessment, Appeals and Review, Allegheny County.

Q. In such capacity do you have charge of the records of the Board?

A. I do.

Q. Do you have with you the real estate assessment record for West Homestead Borough for the year 1942?

A. Yes, sir.

28a Q. Do you have in that record the assessment of the Mesta Machine Company?

A. Yes, sir.

Q. For 1942. What is the assessment in the name of the Mesta Machine Company for that year, in West Homestead Borough?

A. $3,901,504.

Q. Was that the original assessment on that for 1942?

A. No, sir.

Q. What was the original total assessment?

A. The original total assessment was $3,906,004.

Q. How do you account for the difference?

A. There are two items that were incorrectly assessed and have since been assessed to Pennsylvania Railroad exempt and which amount has been taken from the original assessment and credited to Mesta.

Q. And what is that amount?

A. $4,500.

Q. Can you give us the elements making up that total assessment?

A. Well, it consists of land, buildings, and machinery.

Q. What is the total assessment of land?

A. I would have to look at the transcript.

(Appellee's Exhibits "A" and "B" marked.)

By Mr. MONTGOMERY:

Q. I show you this Exhibit "B" and ask you to identify that, if you can, Mr. Sexton?

A. Exhibit "B" is a transcript of the property assessed

29a in the name of Mesta Machine Company by Allegheny County and located in West Homestead Borough, for the year 1942.

Q. Is your certificate attached to that?

A. Yes, sir.

Q. Does that disclose the elements making up this total assessment for 1942?

A. Yes.

Q. What are those elements?

A. Land, buildings, and machinery. The total assessment on land $293,795. Total assessment on buildings $1,123,124. Machinery $2,489,085. I might say that that is the break-down of the original total assessment.

Q. Without the——

A. Without the exoneration of $4,500 taken off?

Q. To what item would that $4,500 credit be chargeable?

A. That's on buildings.

Q. That assessment was made by whom, Mr. Sexton?

A. By the assessor of West Homestead Borough.

Q. Do you know what his name is?

A. Mr. Cosgrove, William Cosgrove.

Q. Do you have a record of assessments of West Homestead Borough for Mesta Machine Company in 1941?

A. Yes, sir.

Q. What was that assessment?

A. Total assessment for 1941, $2,555,590.

Q. And do you have the elements?

A. That consists of assessments on land, buildings, and machinery.

30a Q. I show you this Exhibit "A" and ask you to identify that.

A. Exhibit "A" is the 1941 transcript of property assessed by Allegheny County owned by Mesta Machine Company, or, rather, in the name of Mesta Machine Company and located in West Homestead Borough.

Q. And the total of each of the items comprising that assessment?

A. Total assessment on land $274,855. Total assessment on buildings $761,150. Total assessment on machinery $1,519,585. Makes a total assessment of $2,555,590.

Q. Of your own knowledge, Mr. Sexton, do you know why the assessment was increased in 1942 over what it was in 1941?

A. No, sir.

Q. Did the same assessor make the assessment in 1941 who made it in 1942?

A. Yes, sir.

Cross-examination by Mr. MICKEY:

Q. In making the assessment upon the property of Mesta Machine Company, was any distinction made between the property

of the United States and the property of Mesta Machine Company?

A. I couldn't answer that; I am not the assessor.

Mr. MONTGOMERY. I have the assessor here to testify.

Mr. MICKEY. That's all.

31a WILLIAM COSGROVE, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. What is your name?

A. William Cosgrove.

Q. What is your office or occupation?

A. Assessor for Allegheny County.

Q. Are you assigned to any particular district?

A. Thirty-first Ward, City of Pittsburgh, and West Homestead Borough.

Q. What do you assess?

A. Assess real estate.

Q. Were you acting in that capacity in making the assessments for 1941 and 1942?

A. Yes, sir.

Q. Did you have occasion to make an assessment of the property of Mesta Machine Company in West Homestead Borough for 1942?

A. Yes, sir.

Q. I show you Exhibits "A" and "P," which have been identified by Mr. Sexton as transcripts of the record of the assessments of the Mesta Machine Company in West Homestead Borough for 1941 and 1942. Can you state from an examination of those if they are correct copies of your assessments of that property for those years?

A. Yes, sir; they are.

Mr. MONTGOMERY. If the Court please, counsel for the Ap-
32a pellant and I have agreed to limit the remaining part of the testimony to one item of $618,000 on certain machinery for 1942. With that in mind, I will limit the questioning to that point.

The COURT. Yes.

Mr. MONTGOMERY. Except for one question.

By Mr. MONTGOMERY:

Q. Those exhibits show that the assessment for 1942 is higher than it was for 1941. What is the reason for that?

A. Well, the Mesta Machine Company in 1941 acquired some new land, built additional buildings, and also installed new machinery in their plant.

Q. And for that reason the assessment was increased for '42?

A. Yes, sir.

Q. What is the Mesta Machine Company?

A. Well, the Mesta Machine Company is a corporation situated in West Homestead Borough, a mill, I would call it, a mill or a manufacturer.

Q. This assessment was made as of real property?

A. That's right.

Q. In Exhibit "B" which is the 1942 assessment, you have an item of machinery of $618,000?

A. Yes, sir.

Q. Do you know where that particular machinery is located on the Mesta property and what it is?

A. Yes, sir.

Q. Where is the machinery covered by that item located on the Mesta property?

A. In the Ordnance Department.

33a Q. Is that a building or a group of buildings?

A. It is a group of buildings.

Q. Is there any identification on the buildings as to being Ordnance Department?

A. It is designated on the transcript here for 1942 as the Ordnance Department grouped in three separate aisles known as "A," "B," and "C."

Q. Did you make an examination of the machinery covered by that item?

A. Yes.

Q. Do you know about when you examined that?

A. October, 1941.

Q. Did you make the examination alone?

A. No, sir; I had the assistance of the special machinery assessor, Mr. Frauenheim.

Q. Did you make a list of that machinery at that time?

A. Yes, sir.

Q. Do you have a list of that machinery in your records there?

A. Mr. Frauenheim has a list of the machinery, an itemized list of the machinery.

Mr. MONTGOMERY. If the Court please, counsel will agree to submit a list of the items of machinery covered by this $618,000 as part of the record.

The COURT. Who will submit it?

Mr. MONTGOMERY. It will be stipulated by counsel for the Appellant and counsel for the County as a list of the machinery covered by this one item of $618,000.

34a The COURT. You mean today?

Mr. MONTGOMERY. Yes.

The COURT. Do you have it now?

Mr. MONTGOMERY. We have a list that has been made part of this stipulation of facts that was submitted but it is really not in the form to submit.

The COURT. All right.

Mr. MONTGOMERY. We reserve the right to submit that.

The COURT. All right.

By Mr. MONTGOMERY:

Q. This particular machinery was installed in what manner when you assessed it, Mr. Cosgrove?

A. It was installed in the regular manner that all the machinery in the Mesta Machine Company is installed.

Q. And how is that?

A. All these machines that they have, boring machines and drill presses and such machinery installed and bolted to the foundation.

Q. What sort of foundation?

A. Concrete foundation.

Q. Is it elevated off the floor or sunken in?

A. In some cases it is elevated and some cases it is sunken in the floor.

Q. All of them are bolted into the foundation?

A. Yes, sir.

35a Q. Are these foundations especially built to accommodate the particular machines, or are they a general type of foundation?

A. They are built to suit the type of machine.

Q. Was there any identification mark on these machines at the time your assessment was made?

A. In October, 1941, when Mr. Frauenheim and myself appraised them, there was no identification mark on the machinery other than regular identification mark of the Mesta Machine Company machinery.

Q. Did all this machinery of the Mesta Machine Company have identification marks?

A. Yes, sir; I wouldn't say all the machines, most of the machines.

Q. What type of identification mark was that?

A. They just have a certain number; that is an alphabetical letter and number in back of it.

Q. Are they plates that are attached to the machine, or are they painted on?

A. Some places they are stenciled with plates right on the machine and other places they are cut right in the machine, these numbers, parts of the machine itself.

Q. How are they recognized with numbers on other machines of the Mesta?

A. In October they just looked the same as the rest of the Mesta Machine Company machinery that was installed.

Q. Are these numbers in series that you can tie in to other machines?

A. As you go from one department to the other, different groups of buildings, they have different serial numbers.

36a Mr. MICKEY. I wish to object to the materiality as to any serial numbers and any marks on the machinery designated as Mesta machines.

Objection overruled.

By Mr. MONTGOMERY:

Q. Could you identify these numbers as being Mesta numbers?

A. No; I wouldn't say that.

Q. How were they similar to these other numbers on other Mesta machines?

A. They were the same type lettering and same type numbers that had been used on regular machines of the Mesta Company.

Q. Any initials on them to say Mesta Machine Company?

A. No; I didn't see that.

Q. They just had a number?

A. That's right.

Q. I understand the type of enumerating these machines and the type number was similar to that used on other Mesta equipment, is that correct?

A. That's right.

Mr. MONTGOMERY. Cross-examine.

Cross-examination by Mr. MICKEY:

Q. You mentioned the manner in which the machinery in question was fastened to the floor or foundation of the Mesta building?

A. Yes, sir.

Q. I believe you said it was fastened with bolts?

37a A. That's right.

Q. It would be possible, would it not, to remove the machinery from the building without damage to the building itself?

A. You mean from the foundation?

Q. From the building. To remove it from the foundation, unscrew the bolts and remove it from the foundation without any damage to the actual building itself?

A. That's right.

Mr. MICKEY. That's all.

H. T. FRAUENHEIM, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. Your name, sir?

A. H. T. Frauenheim.

Q. What is your office or occupation?

A. Special machinery assessor for Allegheny County.

Q. How long have you been making appraisements of machinery for Allegheny County?

A. Seven years.

Q. Did you have occasion to make an appraisement or aid in an assessment of the machinery located at the Mesta plant in West Homestead for the year 1942?

A. Yes, sir.

Q. It has been testified in the assessment there is an item of $618,000 for machinery. Did you aid in the assessment of that item?

38a A. Yes, sir.

Q. You have the break-down or the items comprising that total assessment of machinery?

A. Yes, sir.

(Appellee's Exhibit "C" marked.)

By Mr. MONTGOMERY:

Q. Mr. Frauenheim, I show you a series of papers here marked Exhibit "C" and ask you to examine them before answering the next question.

A. Yes, sir.

Q. Can you tell what that is?

A. That's a copy of the record that we made originally of the assessment of the machinery in the Mesta plant at West Homestead.

Q. Now, is it a list of all the machinery or just the machinery in the Ordnance Building?

A. It is a list of the machinery in the Ordnance.

Q. Now, the total of that is $618,000, as has been testified. You aided in making that assessment, did you?

A. Yes, sir.

Q. Now, I call your attention to the numbers on the left hand side of the several sheets which are marked "Equipment numbers." Do you understand those markings and what they are?

A. Yes, sir.

Q. Will you explain to us just what those numbers represent?

A. They represent the identification mark which is a part of the Mesta Machine Company's plan of marking their equipment in their plant.

39a Q. Do those numbers correspond with other numbers on other equipment in other parts of the plant?

A. Exactly.

Q. In what manner do they correspond?

Mr. MICKEY. Object to the materiality of this question. Object to the question as being immaterial.

The COURT. What is the purpose?

Mr. MONTGOMERY. The purpose is to show that at the time this assessment was originally made these items here bore an identification, Mesta identification number, the same as the other machinery in the plant.

Mr. MICKEY. I understand, your Honor, that there will be no contention that the machinery actually belonged to the Mesta at the time. If that is the case any numbers that they bore is entirely immaterial. If the evidence is offered to show title to the machinery was in the Mesta Machine Company, that is one matter. If it is a matter of justifying the assessment, that is entirely immaterial because the true fact as to ownership of the property was pointed out to the Board of Assessment & Appeals. I don't see that it has any bearing on the case at all.

The COURT. We will permit it. You are not going into any details?

Mr. MONTGOMERY. No.

40a The COURT. To save time I will just permit it.

By Mr. MONTGOMERY:

Q. The figures at the right on those sheets, what do they represent, Mr. Frauenheim?

A. The value?

Q. Yes, sir.

A. They represent the assessed valuation.

Q. Of each particular machine?

A. Of each item; yes, sir.

The COURT. You don't contend, Mr. Montgomery, that title of these machines is in the Mesta Machine Company?

Mr. MONTGOMERY. Not absolute title if the Court please; no. Of course our position is they are part of the Mesta plant there; they form a part of the entire mill or manufactory.

Mr. MONTGOMERY. Cross-examine, Mr. Mickey.

Mr. MICKEY. No questions.

Mr. MONTGOMERY. If the Court please, I offer in evidence Exhibits "A," "B," and "C."

The COURT. Any objection?

Mr. MICKEY. No objection to the exhibits.

The COURT. Without objection, the exhibits will be admitted.

41a Mr. MONTGOMERY. The County rests.

APPELLANT'S CASE

Offer in evidence

Mr. MICKEY. If your Honor please, I offer in evidence the following agreed statement of facts prepared by counsel which I will read a paragraph at a time.

The COURT. You may proceed with the understanding if Mr. Montgomery has any objection to it he will make the objection as to each paragraph.

Mr. MONTGOMERY. Leave out the word "agreed," if you will.

Mr. MICKEY. All right.

The COURT. Well, it is offered as a statement of facts to which you agree——

Mr. MONTGOMERY. Unless objection is made.

The COURT. Unless you object to it paragraph by paragraph.

Mr. MONTGOMERY. I reserve the right also to object as to materiality.

The COURT. Yes. You do that as Mr. Mickey goes along.

42a Mr. MICKEY. Paragraph one: "Mesta Machine Company is a corporation organized under the laws of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. Paragraph two: "The board of Property Assessment, Appeals and Review of Allegheny County, hereinafter referred to as the Board, is a body charged by law with the duty of making, or causing to be made, all assessments and valuations of real property within said County for the purpose of county, city, borough, town, township, and school taxation."

Mr. MONTGOMERY. No objection to that paragraph.

Mr. MICKEY. Paragraph three: "As used herein, the term 'Officer in Charge' shall mean officer of the United States Army, Ordnance Department, assigned by the War Department as Officer in Charge to represent it and the Contracting Officer of the War Department and authorized to act for the United States in connection with the performance of the contract referred to hereafter, or the agents or representatives of such Officer in Charge; the term 'machinery and machine tools' shall mean machines and large, stationary, power driven tools, generally known as machine tools, but it shall not mean small hand tools."

43a Mr. MONTGOMERY. That is agreed to with this reservation, that there are no small hand tools included in this assessment; so that part is immaterial.

The COURT. This is only an agreement on the terminology.

Mr. MICKEY. That last sentence was inserted at the suggestion of the County.

The COURT. Yes.

Mr. MICKEY. To avoid the possibility that the Court might think there had been assessment of machinery as personal property.

Mr. MICKEY. Paragraph four: "On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto, which are true and correct except that there have been deleted therefrom certain figures not material to the present controversy that in the public interest should not be disclosed, are attached to and made a part of the Intervening Petition of the United States filed herein. Said copy of the contract and the amendment thereto are made a part hereof by reference."

44a Mr. MONTGOMERY. Objection is entered to that as being incompetent, irrelevant, and immaterial. The County does not deny, however, that there is such a contract in existence.

Mr. MICKEY. Your objection is that the statement is immaterial, not that it is incompetent. You agree that such a contract was entered into and that the copy of the contract as attached to the intervening petition of the United States which has been filed herein is a true and correct copy of the contract with the exceptions stated in this paragraph?

Mr. MONTGOMERY. Agree to that extent; yes, sir.

Objection overruled.

Exception noted.

Mr. MICKEY. Paragraph five: "Mesta Machine Company erected a building, #30, which is otherwise known as the Ordnance Building, on land owned by Mesta Machine Company, which was to be and was equipped with machinery and machine tools as set forth in Schedules A, B, and C of said contract and in the list attached to the petition of Mesta Machine Company filed herein, and in the document offered in evidence herein and marked as County's Exhibit 'C,' all of which machinery and machine tools were furnished by the United States, as provided in the contract and as hereinafter set forth."

Mr. MONTGOMERY. Down to the portion where it commences, "all of which machinery and machine tools were
45a furnished by the United States," is admitted, but the balance of the paragraph is not admitted at this time.

Mr. MICKEY. Perhaps it would not be objectionable to counsel for the County if we stated it this way: "All of which machinery and machine tools were acquired and installed in said building under the provisions of said contract and as hereinafter set forth." Does the County object to that statement?

Mr. MONTGOMERY. No; I will not object to that statement. I would like to enter an objection to the materiality of paragraph five just read, although I will agree to the truth of the statement as read.

The COURT. Objection overruled. You may proceed.

Exception noted.

Mr. MICKEY. "6. Most of the machinery and machine tools were produced by various manufacturers, other than Mesta Machine Company, and acquired from them by purchase of the United States from or through Mesta Machine Company; one of the machines was produced by Mesta Machine Company in its machine mills, and was purchased from Mesta Machine Company by the United States; and the remainder were supplied from stocks of the United States at the United States Arsenal at Watervliet, New York."

46a Mr. MONTGOMERY. Object to the materiality.

Objection overruled.

Exception noted.

Mr. MICKEY. "7. A list of the machinery and machine tools purchased from the manufacturers other than Mesta Machine Company, showing the assessed valuation of each, appears as sheets one, two, and three of County's Exhibit 'C,' and is made a part hereof, all of the same were purchased, shipped, delivered, and paid for in substantially the same manner as hereinafter set forth in a typical transaction showing the purchase of a 30-inch gun-boring and turning lathe purchased from American Tool Works Company, of Cincinnati, Ohio, which transaction was as follows:"

Mr. MONTGOMERY. Objected to as to materiality.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (a): Mesta Machine Company requested American Tool Works Company to furnish a quotation or proposal on the manufacture and sale of three 30-inch gun-boring and turning lathes. American Tool Works Company, on October 10, 1940, submitted to Mesta Machine Company a proposal, a true and correct copy of which is attached hereto, marked Exhibit 2, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

47a Objection overruled.
Exception noted.

Mr. MICKEY. I will offer all of the exhibits at the end, your Honor.

Mr. MICKEY. "7 (b): Thereafter, on November 21, 1940, Mesta Machine Company prepared a purchase order for the purchase of three 30-inch gun-boring and turning lathes, on the basis of the proposal of American Tool Works Company, and submitted the same, together with the proposal, to the Officer in Charge for his approval of the purchase. A true and correct copy of said purchase order with the approval of the Officer in Charge endorsed thereon is attached hereto, marked Exhibit 3, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (c): Mesta Machine Company then forwarded the purchase order to American Tool Works Company, and the latter, on or about June 2, 1941, shipped one of said lathes, No. 01100, to the building of Mesta Machine Company, West Homestead, Pennsylvania, where it was unloaded and assembled by American Tool Works Company, and thereafter inspected by the Officer in Charge who prepared a Receiving Report, showing inspection and acceptance of the lathe by the Contracting
48a Officer. A copy of said Receiving Report is attached hereto, marked Exhibit 4, and made a part hereof. Said copy is true and correct except that there has been deleted therefrom certain matter which is immaterial to the present controversy, and which in the public interest should not be disclosed. Said Receiving Report shows that the shipping point and shipping destination were both in West Homestead Borough, for the reason that by prearrangement said boring and turning lathe was completed and assembled at the premises of Mesta Machine Company instead of at the plant of American Tool Works Company. In cases where the machine was small enough to be shipped assembled, Receiving Reports showed the shipping point as the mill of the producer and vendor. When the machine arrived at the building owned by Mesta Machine Company and was installed and assembled it was inspected by Mesta Machine Company at the same time that it was inspected by the Officer in Charge."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (d): American Tool Works Company, on June 7, 1941, sent to Mesta Machine Company an invoice on account

of the purchase above described, and upon approval of the Officer in Charge, the invoice was paid by Mesta Machine Company on July 7, 1941. A true and correct copy of said invoice of American Tool Works Company is attached hereto, marked Exhibit 5, and made a part hereof."

49a Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "7 (e): Mesta Machine Company thereafter submitted its invoice for the 30-inch gun-boring and turning lathe, dated June 30, 1941, to the Officer in Charge, accompanied by the receipted invoice of American Tool Works Company. A true and correct copy of said invoice of Mesta Machine Company to the War Department, as submitted to the Officer in Charge, is attached hereto, marked Exhibit 6, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "7 (f): The invoice of Mesta Machine Company was checked by the Officer in Charge against the Receiving Report, the invoice of American Tool Works Company, the purchase order, and the original quotation of American Tool Works Company. Upon finding the details correct, the Officer in Charge forwarded the invoice of the Mesta Machine Company with the receipted invoice of the American Tool Works Company to the Fiscal Division of the Pittsburgh Ordnance District of the War Department, for payment."

Mr. MONTGOMERY. Objected to for the same reason.
50a Objection overruled.
Exception noted.

Mr. MICKEY. "7 (g): The Fiscal Division of the Pittsburgh Ordnance District prepared Government voucher Form 1034 for reimbursement of payment to Mesta Machine Company, a true and correct copy of which is attached hereto, marked Exhibit 7, and made a part hereof, and forwarded the same to the Philadelphia Finance Office of the Ordnance Department of the War Department, and payment thereon was made in full by the United States to Mesta Machine Company by check drawn upon the United States Treasury."

Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "8. A description of the machine tool which was produced by Mesta Machine Company and purchased from it by the United States showing the assessed valuation of the same ap-

pears on sheet #4 of the County's Exhibit 'C' and is made a part hereof by reference."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "The transaction of the purchase of said machine tool was as follows:

51a 8 (a): Mesta Machine Company submitted its proposal, dated December 31, 1940, for sale of a trepanning lathe and boring tools, for the approval and acceptance of the Officer in Charge, and said proposal, when approved for purchase by the Officer in Charge served also as purchase order from the United States. A copy of said proposal and purchase order is attached hereto, marked Exhibit 8, and made a part hereof. Said copy is true and correct except that there has been deleted therefrom certain matter which is immaterial to the present controversy, and which in the public interest should not be disclosed."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (b): Thereafter Mesta Machine Company completed production of said trepanning lathe and boring tools in one of its machine tool mills and delivered same to the aforesaid building owned by Mesta Machine Company, where they were inspected by the Officer in Charge, who prepared a Receiving Report, showing inspection and acceptance thereof by the Contracting Officer. A true and correct copy of said Receiving Report is attached hereto, marked Exhibit 9, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

52a Mr. MICKEY. "8 (c): Thereafter Mesta Machine Company submitted to the Officer in Charge its invoice to the War Department, dated September 30, 1941, on account of the purchase above described and on account of some parts for machinery and machine tools, produced by Mesta Machine Company and sold to the United States under its contract during the period covered by said invoice, and also on account of services rendered and material expended in repair and improvement of eight boring lathes belonging to the United States and shipped to the building of Mesta Machine Company as set forth hereinbelow in paragraph 9. A true and correct copy of said invoice is attached hereto, marked Exhibit 10, and made a part hereof."

Mr. MONTGOMERY. Object to the wording "belonging to the United States," in that fashion.

Mr. MICKEY. Counsel understands that these eight boring lathes referred to were shipped from the United States Arsenal at Watervliet, New York.

Mr. MONTGOMERY. Yes; I understand that, but I think that is more or less a conclusion of law, "belonging to the United States," in this respect, that after the shipment and receipt of same by Mesta the title may have been in the United States, but nevertheless Mesta had an interest as lessee there. I think it should be explained along that basis.

Mr. MICKEY. There is a succeeding paragraph which
53a states that that machinery concerned in this assessment, was placed in the plant of Mesta under the terms of the contract.

Mr. MONTGOMERY. I will object to the materiality of that paragraph and ask that the wording—I will let my objection stand as being a conclusion, the manner of ownership.

Mr. MICKEY. Counsel does not contend that the ownership of machines shipped from the Arsenal and belonging to the United States was changed by any other proper manner than as you conceived it by the provisions of the contract?

Mr. MONTGOMERY. That's correct.

The COURT. We can't receive it if it is objected to, but I don't see what the objection is.

Mr. MONTGOMERY. The way it is expressed.

The COURT. They improved eight lathes that belonged to the United States. Shipping to the Mesta Machine didn't change their title.

Mr. MONTGOMERY. Legal title undoubtedly did remain there. The qualified interest of Mesta is not brought out here.

The COURT. Will you change it and say "Legal title to which was in the United States"?

Mr. MONTGOMERY. That's right.

54a Mr. MICKEY. That is perfectly agreeable.

Mr. MONTGOMERY. Put "Legal title" rather than "Belonging to the United States," then I withdraw my objection as to the wording and renew my objection as to the materiality.

The COURT. How do you have it, "Legal title to which was in the United States"?

Mr. MICKEY. "In repair and improvement of eight boring lathes legal title to which was in the United States and which were shipped to the building of Mesta Machine Company."

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (d): The invoice of Mesta Machine Company was checked by the Officer in Charge against the Receiving Report and the proposal and purchase order, and, upon finding the

details correct, the Officer in Charge forwarded the invoice, together with the Receiving Report, to the Fiscal Division of the Pittsburgh Ordnance District of the War Department for payment."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (e): The Fiscal Division of the Pittsburgh Ordnance District prepared a Government voucher for pay-
55a ment to Mesta Machine Company, a true and correct copy of which is attached hereto, marked Exhibit 11, and made a part hereof, and forwarded the same to the Philadelphia Finance Office of the Ordnance Department of the War Department. Payment thereon was made in full by the United States to Mesta Machine Company, by check drawn upon the United States Treasury."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "9: A list of the machines and machine tools which were supplied by the United States from the United States Arsenal at Watervliet, New York, showing the assessed valuation of each, appears as sheet #5 of County's Exhibit 'C,' and is made a part hereof by reference, and the same were shipped by the United States from the Watervliet Arsenal and delivered at the aforesaid building of Mesta Machine Company. Exhibit 12, which is attached hereto and made a part hereof, is a true and correct copy of the shipping ticket, prepared by the Quartermaster Corps, United States Army, upon which shipment and delivery of said machinery and machine tools were made."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "10: All of said machinery and machine
56a tools purchased by the United States as described in paragraph 7 and 8 above, together with those shipped from the United States Arsenal at Watervliet, as set forth in paragraph 9 above, were installed in the aforesaid building constructed by Mesta Machine Company, which building is referred to in paragraph 5 above, and were leased to Mesta Machine Company at the rental prescribed by the contract, for the period of the contract, and for the purposes specified in said contract."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "11: Each of said machines and machine tools described in sheets 1 through 5 of County's exhibit 'C,' and all of them, are now marked 'United States Government Property, Contract No. W-ORD-486.' A photostatic copy of the metal tags which are affixed to each machine or machine tool is attached hereto, marked Exhibit 13, and made a part hereof. At the time of the assessment, approximately one-half of the machines and machine tools were so marked."

Mr. MONTGOMERY. I cannot agree to that as a fact and I also object to the materiality. It seems to be contradictory to what our assessor testified as to what he found out there at the time of making the assessment.

Mr. MICKEY. The witness' statement conflicts too with the
57a information we have, but as my objection to the testimony of County's witnesses disclosed, I don't think it is particularly material. However, it is agreed that the sentence, "At the time of the assessment, approximately one-half of the machines and machine tools were so marked," be struck out and that in its stead the following sentence be substituted, "At the time the County Assessors visited the aforesaid building of Mesta Machine Company and inspected the same for the purposes of assessment they were orally advised that the machinery installed in the building belonged to the United States and it is now so marked."

Mr. MONTGOMERY. Do you know when those marks were placed?

Mr. MICKEY. Our information is that approximately fifty percent of the machinery was marked some time prior to the date of the assessment. Now, whether that means the date of January under which they obtained the notice of the assessment, or whether it means the time of the inspection, I don't know.

Mr. MONTGOMERY. Our information is they were not marked in October when the Assessors visited the plant and made the assessment, but were marked in February or March when they made another trip out there.

The COURT. What difference would it make?

Mr. MONTGOMERY. It makes no difference so far as my
58a theory of this case is concerned; I object to it all as immaterial.

The COURT. If there is no further objection by counsel for the County, the objection as to its materiality is overruled.

Exception noted.

Mr. MICKEY. We agree, and your Honor is of the opinion, how it is marked now and how it was marked then is of no consequence. We have placed that in there because testimony was given by the witnesses for the County.

The COURT. I can't tell you what the Court's opinion is at this time.

Mr. MICKEY. We submit that as our opinion alone.

The COURT. All right.

Mr. MICKEY. Paragraph 12: "Said machines and machine tools are installed in the building and on the real estate of Mesta Machine Company in the same manner as similar machinery owned by Mesta Machine Company is or would be so installed."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. "13: On or about January 1, 1942, the Board revised the then existing assessment and valuation of the real estate of Mesta Machine Company in the Borough of West Home-
59a stead, County of Allegheny, as the same had been previously fixed in the triennial assessment for the years 1940, 1941, and 1942, by adding thereto, among other items, the value of all of the said machines and machine tools, and assessed and valued the same in the total sum of $618,000. County's Exhibit 'C,' which is made a part hereof by reference, is a true and correct itemized list of the machines and machine tools so additionally assessed to Mesta Machine Company and shows the amount at which each of the same has been assessed and valued."

Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "14: On February 5, 1942, the date set by the Board for hearing objections to such additional assessment, Mesta Machine Company appeared before said Board and made objections to the assessment to it of said machinery and machine tools in its 1942 assessment, on the grounds that said machinery and machine tools were the property of the United States, and Mesta Machine Company further objected to said assessment on the grounds that said machinery and machine tools were leased to the Mesta Machine Company in its contract with the United States, and under the express provisions of the contract, was to be removed from its building, and returned to the United States within 90 days after termination of the contract."

Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "15: On April 20, 1942, the Board notified
60a Mesta Machine Company that it had decided unanimously to maintain the assessment to Mesta Machine Company of the value of said machinery fixed at $618,000, as part of its general assessment."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. "16: On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board heard objections by Mesta Machine Company and the United States to the assessment to Mesta Machine Company of said machinery and machine tools in its 1942 assessment, on the grounds that said machinery and machine tools were the property of the United States and were not subject to taxation by the County of Allegheny, and on

the further ground that said machinery and machine tools were leased to Mesta Machine Company in its contract with the United States and under the express provisions of the contract, were to be removed from its building and returned to the United States within ninety days after termination of the contract. The Board gave further consideration to the objections and to the questions involved and on July 30, 1942, it gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery and machine tool assessments totaling $618,000, which it had assessed as a part of the real property of Mesta Machine Company."

61a Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "17: On July 30, 1942, Mesta Machine Company made payment to John J. McLean, County Treasurer for Allegheny County, of taxes assessed against it by the County of Allegheny for the year 1942, in the amount of $32,431.25. Said payment included the tax upon the assessment made by the Board on the machinery and machine tools which were in possession of Mesta Machine Company as set forth hereinabove. The amount of tax which was paid on account of the assessment of said machinery and machine tools is $5,137.12. Said $5,137.12 was paid under protest by Mesta Machine Company."

Mr. MONTGOMERY. I have to object to that payment under protest.

Mr. GLOCK. We have a copy of the letter.

Mr. MONTGOMERY. No objection if it is affirmed by Mr. McLean.

Mr. MONTGOMERY. It is admitted the payment was made under protest.

Mr. MICKEY. I would like to add this paragraph: In view of the fact we had expected to complete the stipulation of facts we prepared before going to trial, most of the exhibits do not have

62a signatures in the places at which they appear on the originals, the first copies. These papers are prepared with numerous duplicates and in each place where there is a signature typed on the face of the exhibit showing approval, or dissent, or whatever the particular document may show, we would like to have it agreed that the signatures appear on the documents in the form that they are typed on the face of the documents.

Mr. MONTGOMERY. I have no objection to your presenting photostats of the signatures, if that is what you mean?

Mr. MICKEY. We can either have the signatures written on there or can agree that the documents were all signed, as the originals were.

Mr. MONTGOMERY. Either way; I have no objection. I object to the materiality but so far as the existence of the exhibits is concerned I have no objection.

Mr. MICKEY. If the Court please, I would like to offer in evidence Exhibits Nos. 1 through 13, which are referred to in the Statement of Facts just presented.

Mr. MONTGOMERY. I renew my objection on the ground of being immaterial, to all of the exhibits.

The COURT. Objection overruled. The exhibits will be admitted. Exception noted.

Mr. MICKEY. We rest, Your Honor.

63a The COURT. No rebuttal?

Mr. MONTGOMERY. I don't think there is any rebuttal, no.

The COURT. No rebuttal.

Exhibit A

1941

MESTA MACHINE COMPANY

W. HOMESTEAD BOROUGH

	Land	Buildings	Machinery
Total	274,855	761,150	1,519,585

Total assessment—$2,555,590.00.

NOVEMBER 18, 1942.

The above transcript is a true and correct copy of the Assessment in the name of Mesta Machine Company in West Homestead Borough as shown by the books of this Office for the year 1941, at the above date.

BOARD OF PROPERTY ASSESSMENT,
APPEALS, AND REVIEW,
[SEAL] J. VINCENT SEXTON, *Clerk*.

64a *Exhibit B*

1942

MESTA MACHINE COMPANY

WEST HOMESTEAD BOROUGH

	Land	Buildings	Machinery
Total	293,795	1,123,124	2,489,085

Total Assessment	$3,906,004
ac #13928	4,500
	$3,901,504

NOVEMBER 18, 1942.

The above transcript is a true and correct copy of the Assessment in the name of Mesta Machine Company in West Homestead Borough as shown by the books of this Office for the year 1942, at the above date.

BOARD OF PROPERTY ASSESSMENT, APPEALS, AND REVIEW.
[SEAL] J. VINCENT SEXTON, *Clerk.*

65a

Exhibit C

Equip.	#	Machine	H. P.	Sheet No. 1
125	1	E. O. T. crane, 15 ton, 60' span (P-H)		$10,000
126	1	E. O. T. crane, 15 ton, 60' span (P-H)		10,000
127	1	E. O. T. crane, 15 ton, 60' span (P-H)		10,000
128	1	E. O. T. crane, 15 ton, 60' span		10,000
10800	1	Automatic machine (Keller)	5	3,500
	1	Tool grinder (P-W)	½	850
	1	M/G set, 10 EW	15	180
06104	1	24" Shaper (G-E)	5	1,500
06103	1	24" Shaper (P-J)	5	1,500
04202	1	Model H, #5 Vert. Milling machine (M)	15	3,000
04200	1	Model H, #5 Vert. Milling machine (m)	15	3,000
04201	1	Model H, #5 Vert. Milling machine (m)	15	3,000
05202	1	42" Vert. turret lathe (Bullard)	30	6,500
05203	1	42" Vert. turrett lathe (Bullard)	30	6,500
03100	1	Hypro slotter vert. (Rockford)	20	8,500
03101	1	Hypro slotter vert. (Rockford)	20	8,500
05800	1	Hypro slotter Horzi (Barnes)	25	9,500
66a 07100	1	Model F, 20" x 12' grinder (G-L)	25	6,200
13800	1	Universal broaching machine (Colonial)	40	10,000
21205	1	18" x 78" Engine lathe (American)	10	6,000
21206	1	18" x 78" Engine lathe (American)	10	6,000
21207	1	18" x 78" Engine lathe (American)	10	6,000
21208	1	18" x 78" Engine lathe, (American)	10	6,000
21000	1	Power saw (Marvel)	1½	1,200
21203	1	3' Radial Drill press (American)	7½	1,800
				Sheet No. 2
21200	1	Model H, #5 Vert. milling machine (M)	15	$3,000
21201	1	24" Shaper (G-E)	10	4,000
21202	1	24" Shaper (G-E)	10	4,000
21002	1	Double Grinder (U. S. Electric)	3	100
21204	1	Tool grinder (Ingersoll)	3	500
25003	1	Tool grinder (Sellers)	5	500
21100	1	Tool grinder (Norton)	¼	1,500
25002	1	Tool grinder (Sellers)	5	500
21004	1	Tool grinder (Sundstand)	5	500
21101	1	Tool grinder (Norton)	5	1,500
21006	1	Metal Master (Do All)	3	120
21005	1	Vert. drill press (Buffalo)	3	300
11202	1	5' Radial drill press (Carlton)	7½	2,500
67a 04100	1	Planer type milling machine (Ingersoll)	7½	7,500
04101	1	Planer type milling machine (Ingersoll)	7½	7,500
01803	1	Super. gun boring and turning lathe (American)	15 40 2	25,000
11203	1	Drill press (Lucas)	5	1,800
12200	1	#18 power saw (Marvel)	5	1,200
010801	1	Super gun boring and turning Lathe (American)	40 15	26,000
0182	1	Super gun boring and turning lathe (American)	40	25,000
01115	1	42" x 27' Turning lathe (Le Blonde)	40	9,500

Exhibit C—Continued

Equip.	#	Machine	H. P.	Sheet No. 2
01116	1	42" x 27' Turning lathe (LeBlonde)	40	$9,500
01113	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
01114	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
01111	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
				Sheet No. 3
01112	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
68a 08800	1	Honing Machine, 22' long (Barnes)	25 15	25,000
07800	1	Roll grinder (Farrell)	25	15,000
02204	1	#1, Automatic Turrettathe (W-S)	25	6,000
	1	10 Ton platform scale (Howe)		770
02203	1	Hyd. press 3' x 16' Planer (Cinci)	25	5,000
02201	1	Hyd. press 3' x 18' Planer (Cinci)	25	5,000
02.00	1	Hyd. press 3' x 18' Planer (Cinci)	25	5,000
02202	1	Hyd. press 3' x 18' Planer (Cinci)		5,000
05200	1	Boring drilling milling machine (G-L)	15	12,000
05201	1	Boring drilling milling machine (G-L)	15	12,000
11201	1	5' Radial drill press (Carlton)	7½	2,500
11200	1	3' Radial drill press (American)	5	2,500
01204	1	36" x 60" Engine lathe, H. D. (LeBlonde)	15	8,000
01203	1	36" x 60" Engine lathe H. D. (LeBlonde)	15	8,000
01202	1	36" x 60" Engine lathe, H. D. (LeBlonde)	15	8,000
01201	1	36" x 60" Engine lathe H. D. (LeBlonde)	15	8,000
60a 01200	1	36" x 60" Engine lathe (LeBlonde)	15	8,000
		Total		444,000
				Sheet No. 4
07800	1	Trepanning Lathe (Mesta)	2-15	$14,000.00
				Sheet No. 5
01103	1	42" x 60' Boring lathe (Bennett)	15 10 15	$15,000
01104	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01105	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01106	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01107	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01108	1	42" x 60' Boring Lathe (Bennett)	10 15	15,000
01109	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01110	1	42" x 60" Boring lathe (Bennet)	10	15,000
70a 09001	1	Rifling machine, 22' long (Bridgeport)	10	20,000
09000	1	Rifling machine, 22' long (Bridgeport)	10	20,000
				160,000

Exhibit 1

UNITED STATES OF AMERICA
(Coat of Arms)

WAR DEPARTMENT

WASHINGTON, *August 31, 1942.*

I hereby certify that I am the custodian of the contract files of the Office of The Chief of Ordnance, War Department, and that

the attached papers relating to Contract No. W-ord-486, dated October 30, 1940, with Mesta Machine Co., for guns, and Supplement No. 1 thereto dated Feb. 21, 1941, are true copies of papers in my custody in the Office of The Chief of Ordnance.

MARGARET O. GAYLORD,
Chief, Contract Section, Fiscal Branch,
Office of The Chief of Ordnance.

I hereby certify that Margaret O. Gaylord, who signed the foregoing certificate, is the custodian of the contract files of the Office of The Chief of Ordnance, War Department, and that to her certification as such full faith and credit are and ought to be given.

71a In testimony whereof I, Henry L. Stimson, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 31st day of August 1942.

[SEAL]

HENRY L. STIMSON,
Secretary of War.
By J. C. COOK,
Assistant Chief Clerk.

War Department Form No. 7.

Contract No. W-ORD-486

COST-PLUS-A-FIXED-FEE EQUIPPING LEASE OF GOVERNMENT-OWNED EQUIPMENT AND FIXED-PRICE (LUMP SUM) SUPPLY CONTRACT

WAR DEPARTMENT

Contractor: Mesta Machine Company, Pittsburgh, Pennsylvania.

Fixed-fee in lieu of profit of Contractor for producing or procuring and installing equipment in Contractor's plant: $1.00 under Title I.

Rental for lease of Government-owned equipment $1.00 under Title II.

Contract for: The production or procurement and installation of equipment in the Contractor's plant on a cost-plus-a-fixed-fee basis; the lease of the Government-owned equipment; and

72a the manufacture of guns, * * * on a fixed-price (lump-sum) basis.

Place: West Homestead, Pennsylvania.

Estimated cost of equipping * * * under Title I.

Total contract price for * * * guns, * * * complete * * * under Title III.

Payments to be made by and to the Finance Officer, U. S. Army, at Philadelphia, Pa.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to, the following Procurement Authorities, the available balances of which are sufficient to cover the cost of same.

ORD 7404 P99 A 0141-01.
NG 15416 P57-3030 A 1405-01.
ORD 7640 P2-3030 A (1005)-105-01.
ORD 7640 P11-3030 A (1005)-105-01.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

This contract is authorized by the Act of July 2, 1940 (Public No. 703, 76th Congress).

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COST-PLUS-A-FIXED-FEE EQUIPPING LEASE OF GOVERNMENT OWNED EQUIPMENT AND FIXED-PRICE (LUMP SUM) SUPPLY CONTRACT

This Contract, entered into this 30th day of October 1940, by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Mesta Machine Company of the City of Pittsburgh, in the State of Pennsylvania, hereinafter called the Contractor, witnesseth that:

75a Whereas, the Government desires to have the Contractor, as an independent Contractor, produce or procure and install in the Contractor's plant on a cost-plus-a-fixed-fee basis, equipment necessary for the partial manufacture, in conjunction

with the Contractor-owned facilities, of Guns, * * * complete; and

Whereas, the Government desires to lease the Government-owned equipment to the Contractor; and

Whereas the Government desires to purchase on a fixed-price (lump sum) basis, Guns, * * * complete, manufactured in the Contractor's plant; and

Whereas the accomplishment of the above-described work by means of a contract after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas as a result of such negotiations the Secretary of War has directed that the Government enter into such a contract with the Contractor, for the accomplishment of the above-described work;

Now, therefore, the parties hereto do mutually agree as follows:

TITLE I

PRODUCTION OR PROCUREMENT AND INSTALLATION OF EQUIPMENT

Article I-A—Statement of Work

1. The Contractor shall as an independent contractor and not as an agent of the Government, in the shortest reasonable time on a cost-plus-a-fixed-fee basis:

76a (a) Purchase or produce the machinery and the special equipment therefor, set forth in Schedule "A," which is attached hereto and specifically made a part hereof;

(b) Purchase or produce the special jigs, fixtures, tools, gages, etc., set forth in Schedule "B," which is attached hereto and specifically made a part hereof;

(c) Purchase or produce the miscellaneous factory equipment set forth in Schdule "C," which is attached hereto and specifically made a part hereof;

(d) Install, or cause to be installed, in the Contractor's plant at West Homestead, Pennsylvania (hereinafter called the Contractor's plant), the equipment set forth in said Schedules "A," "B," and "C," to the extent that installation is necessary;

2. Such work and services to be performed by the Contractor shall be subject in all respects to the supervision, direction, and instructions of the Contracting Officer.

Article I-B—Estimates

It is estimated that the total cost of the work covered by this Title I will be approximately * * * Dollars ($ * * *)

exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government within six (6) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

77a

Article I–C—Consideration

In consideration for its undertaking under this Title I, the Government shall pay to the Contractor the following:

(a) Reimbursement for expenditures as provided in Article I–D hereof.

(b) A fixed fee in the amount of One Dollar ($1.00).

which shall constitute complete compensation for the Contractor's profit under this Title I.

Article I–D—Reimbursement for Contractor's Expenditures Under Title I

1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work under this Title I as may be approved or ratified by the Contracting Officer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work under Title I.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Transportation charges (including loading and unloading) on materials, supplies, and equipment.

(d) Premiums on such bonds and insurance policies as the Contracting Officer may require for the protection of the Government; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary, and other

78a insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(e) Losses and expenses, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable.

(f) The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

(g) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used, including those owned by the Contractor.

(h) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

(i) General administrative and other general expenses of the Contractor (other than expenses of the Contractor which are covered by other Items of this Section 1 of Article I–D) deemed
79a for the purpose of this contract to be incident to the work under this Title I, in the amount of Eighty Thousand Dollars ($80,000.00), payable in six equal monthly installments of Thirteen Thousand Three Hundred Thirty-three Dolars ($13,333.33) and thirty-three cents, the first installment to be paid one month after the date of execution of this contract.

2. The Government reserves the right to furnish any equipment or materials necessary for the completion of the work under this Title I upon so notifying the Contractor prior to any commitment by the Contractor therefor. In the work under this Title I, the Contractor shall be free (but shall not be obligated) to use any equipment and materials of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials will be supplied. In the event the Government is able to obtain equipment or material of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so by so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material.

3. The Government reserves the right to pay directly to common carriers any or all freight charges on equipment, materials, and supplies.

4. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

5. No salaries of the Contractor's executive officers, no
80a part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in section 1 of this Article I–D, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

6. The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

Article I–E—Payments

1. Reimbursement for Cost.

The Government will currently reimburse the Contractor for expenditures made in accordance with Article I–D upon certification to and verification by the Contracting Officer of the original signed pay rolls for labor, the original paid invoices for materials, or other original papers. Generally,
81a reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

2. Payment of the Fixed-Fee.

The fixed-fee of One Dollar ($1.00) prescribed in Article I–C shall be compensation in full for the Contractor's profit under Title I and shall be paid to the Contractor upon completion and acceptance of the work provided for in this Title I.

3. Payments by Contractor.

If bills for purchase of material, machinery or equipment, or pay rolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor under this Title I are not promptly paid by the Contractor or subcontractor as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or pay roll. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five

(5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly.

4. Final payment.

Upon completion of the work under this Title I and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Article I–D hereof, and of
82a the fee, less any sum that may be necessary to settle any unsettled claims for labor or material, or any claim the Government may have against the Contractor. The Contracting Officer shall act upon the acceptance of the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of Title I of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Article I–F—Records and Accounts—Inspection and Audit

1. The Contractor agrees to keep records and books of account, on a recognized cost-accounting basis, showing the actual cost to him of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of Title I of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of 3 years after completion or termination of this contract,
83a all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article I–G—Special Requirements Applicable to Title I

1. The Contractor hereby agrees that it will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require.

(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of two thousand dollars ($2,000.00) made by it for the purpose of the work under this Title I for services, materials, supplies, machinery, or equipment or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of $500.00 shall be made or placed without the approval of the Contracting Officer.

84a (d) Enter into no subcontract for any portion of the work under this Title I without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part at the site of the work, of some part of the work described in Title I hereof.

(e) At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give.

(f) The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(g) At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article I-H—Title

The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

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Article I–I—Materials and Workmanship

1. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

2. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted samples have been approved by the Contracting Officer.

Article I–J—Changes

The Contracting Officer may, at any time, by a written order and without notice to the sureties, require additional work, or direct and omission of work covered by this Title I. If such changes cause a material increase or decrease in the amount of or character of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 30 days from the date the change is ordered: Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of

86a the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article IV–H hereof.

But nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article I–K—Termination of Contract by Government

1. Should the Contractor at any time refuse, neglect, or fail to prosecute the work under this Title I with promptness and diligence, or default in the performance of any of the agreements therein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under Title I of this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may

have against the Contractor or to any claims which the Contractor may have against the Government. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate work under all subcontracts insofar as such orders and/or work are chargeable to this contract.

87a 2. If the work under Title I of this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of all materials, tools, equipment, and appliances and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this Title I as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of Title I of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of Title I of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

(b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article I-D and not previously reimbursed.

(c) If this Title I is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting

88a services in connection with the settlement of this contract as the Contracting Officer may approve.

(d) The obligation of the Government to make any of the payments required by this Article, or by paragraph 2, Article I-E of this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor.

Title II

LEASE OF GOVERNMENT-OWNED EQUIPMENT

Article II–A—Subject Matter

1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof.

2. The Contractor shall maintain and keep in repair the Government-owned equipment described in Title I hereof and leased to the Contractor hereby.

Article II–B—Term

1. The term of this lease shall be for the period during which Guns, • • • complete, are manufactured by the Contractor under Title III of this contract or any later supplement or amendment of this contract.

2. For the purpose of expediting the manufacture of Guns, • • • complete, and without rental further than that provided in Article II–C hereof, the Contractor shall be permitted to use, subject to the terms and conditions hereof, as they become available for use, any of the Government-owned
89a equipment covered by Title I hereof, or any manufacturing facilities furnished by the Government, prior to the commencement of the term herein created.

Article II–C—Rental

1. The Contractor agrees to pay to the Government in advance, as rental for the term herein created, the sum of One Dollar ($1.00).

Article II–D—General Terms and Conditions

1. The Contractor shall not use any of the equipment herein leased for any purpose other than the manufacture of Guns, • • • complete, without the prior approval in writing of the Chief of Ordnance or his duly authorized representative, except that the Contractor may use for general purposes such machinery and equipment as is purchased or furnished to supplement its existing facilities.

2. At the commencement of the term of this lease, the Contractor shall take an inventory of the machinery and equipment embraced herein, by Plant wherein same is installed. Said inventory shall be submitted to the Chief of Ordnance or his duly authorized representative for approval, and, upon approval, a copy thereof

shall be attached hereto and become a part hereof, as fully as if originally incorporated herein. At the expiration, termination, or revocation of this lease, a similar inventory shall be prepared and submitted.

3. The Government shall not be responsible for damages to property of the Contractor or for personal injuries to the
90a Contractor's officers, agents, servants, or employees, or other persons (except employees of the Government) on the premises as invitees or licensees of the Contractor, arising from or incident to the use of the equipment herein leased, and the Contractor shall save the Government harmless from any and all such claims.

4. The Chief of Ordnance or his duly authorized representative shall, at all times during the leasehold term, have access to the Plant, and the Contractor's building or buildings, wherein any of the equipment herein leased is situated, for the purpose of inspecting or inventorying the same.

5. The liability of the Contractor for loss, damage, or destruction of the equipment herein leased, or any part thereof, shall be that of a bailee under a mutual benefit bailment.

6. The Contractor shall not remove any of the equipment herein mentioned from the Plant without first obtaining the written consent of the Contracting Officer.

Article II-E—Termination—Disposition of Equipment

In the event of termination of Title III of this contract in accordance with the terms of Article II-K of Title III hereof, or in the event of complete performance of this contract by the Contractor and unless a new contract or contracts satisfactory to the Contractor as to price, delivery schedule, and quantities have been entered into and unless a contract to maintain the equipment in a stand-by condition has been entered into by the Government with the Contractor, the Contractor shall at the expense
91a of the Government within ninety (90) days thereafter remove from the premises of the Contractor and ship by railroad to a point designated by the Contracting Officer all of the equipment leased to the Contractor for the performance of this contract, in good condition subject to fair wear and tear and depreciation.

TITLE III

FIXED-PRICE (LUMP-SUM) SUPPLY

Article III–A—Quantities

1. The Contractor shall furnish and deliver * * * Guns, * * * complete, in strict accordance with the specifications, schedules, and drawings, all of which are listed in a part of Drawing Number * * *, revised to include * * *. The term "complete" as used in the contract in connection with the description of the gun to be supplied by the contract, shall mean complete within the use of that term in the applicable specifications, schedules, and drawings.

2. The Government shall deliver to the Contractor at the time of execution of this contract copies of the above Drawing Number * * * and drawings and specifications listed thereon, which will be identified by the signatures of the parties appearing on the copies thereof in the office of the Chief of Ordnance.

3. The Government will furnish to the Contractor f. o. b. Contractor's plant, at the price which the Government actually paid for the forgings, fifty-six tube forgings.

92a 4. Tubes for all of the guns will be shipped by the Contractor to the Watervliet Arsenal for cold working. There will be no charge for the cold working. However the Contractor shall pay the freight from its plant to Watervliet Arsenal and return. The Contractor shall allow two weeks for cold working.

Article III–B—Changes

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings or specifications, except Federal Specifications. Changes as to shipment and packing of all supplies may also be made as above provided. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the Secretary of War or his duly authorized representative. Any claim for adjustment under this article must be asserted within 30 days from the date the change is ordered, provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Secretary of War or his duly authorized representative, adjust

any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as
93a provided in Article IV–H of Title IV hereof. But nothing provided in this Article shall excuse the Contractor from proceeding with the contract as changed.

Article III–C—Deliveries

1. The guns shall be delivered f. o. b. public carrier, at plant of manufacture for shipment, as directed by the Government, such deliveries to be made according to the approximate schedule (appended hereto as Schedule D) which is not guaranteed by the Contractor, but all deliveries shall be completed by * * *.

2. The Contractor reserves the right to anticipate deliveries.

3. The Contractor shall not be deemed to be in default in his obligations to make delivery as provided in this Title III, provided when and to the extent that the Contractor shows that such delivery was prevented or delayed by failure of suppliers of machine tools or other equipment to deliver on dates now promised, by force majeure as hereinafter defined, or by strikes in the plant of the Contractor. Force majeure is defined as follows:

(a) Civil war, riots, or insurrections in the United States;

(b) Any law, proclamation, ordinance, or regulation of the Government or of any State in which the performance of this Title III of this contract is carried on by the Contractor or by suppliers of the Contractor. Any such law, proclamation, ordinance, or regulation shall be deemed to have been passed, made or promulgated with due authority and powers;

94a (c) Floods, fires, explosions, or other catastrophe or serious accident;

(d) Epidemics or quarantine restrictions;

(e) Any labor trouble in the plants of the suppliers of the Contractor causing cessation or interruption of the work and delaying delivery of materials to the Contractor or the inability or failure of the suppliers of the Contractor to deliver materials to the Contractor.

Without limitation by enumeration of the foregoing, any other cause duly established emanating either from the Government or its representatives or from events which cannot be foreseen and independent of the will of the Contractor and which cause would result either in delaying or preventing execution by the Contractor of its obligations.

4. The Contractor promptly, after it shall have discovered the existence of any cause of delay, shall notify the Government in writing of the existence of such cause and whether or not it

contends that any delay resulting from such cause will be excusable under the provisions of this Article and the extent or anticipated extent of such delay.

Article III–D–Prices

1. The Government will pay to the Contractor for each Gun, * * * complete, manufactured in accordance with the drawing number referred to in Article III–A, delivered to the Government and accepted by it in accordance with the provisions of Title III of this contract, the sum of * * * Dollars ($ * * *) per Gun.

95a 2. The prices quoted in Section 1 of this Article III–D exclude any charge for equipment, which is leased to the Contractor by the Government in accordance with Title II, hereof.

Article III–E—Price Adjustments

1. Taxes.

(a) Federal taxes.—The contract prices, as stated in Article III–D herein, include any Federal tax imposed by the Congress, prior to the date of this contract, which is applicable to the guns purchased herein. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date of this contract and made applicable directly upon the production, manufacture, or sale of the guns covered by this contract, and are paid to the Government by the Contractor on said guns herein contracted for, then the prices quoted in Article III–D of this contract will be increased or decreased accordingly, and any amount due the Contractor as a result of such change shall be charged to the Government and entered on vouchers (or invoices) as separate items. The prices quoted herein do not include any Federal taxes from which exemption is granted, or as to which a credit or refund is provided for under the provisions of section 401 of the Revenue Act of 1935 (Act of August 30, 1935; 49 Stat. 1014, 1025–1026) as amended.

(b) State, County, and Municipal Taxes.—The contract prices as stated in Article III–D herein do not include any tax imposed by any state, county, or municipality upon the trans-

96a action of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement,

an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated.

2. Labor.

The contract prices stated in Article III–D are subject to adjustments for changes in labor costs, such changes involving increases or decreases in said contract prices to be determined in accordance with the following method: Provided, however, when the expenditures made under this contract reach the total contract price under Title III prior to completion of performance and available appropriations are exhausted, the Government shall have the right, without further liability, to terminate the contract.

(a) The proportion of the contract price under Title III represented by direct labor is accepted as 65% of the contract price under Article III–D.

(b) Average hourly earnings in all manufacturing industries (durable goods), compiled by the United States Department of Labor, Bureau of Labor Statistics, will be obtained by the War Department for each month of the contract period under Title III and calculations will be made of the rates of change
97a of such average hourly earnings for each month in comparison with the average hourly earnings for the month of * * * as a base. The rate of change for each month will be applied to the proportion of the contract price under Title III represented by direct labor as given in item (a) above and the results will be applied as an increase or decrease in the contract price of all guns delivered and accepted during the following month.

(c) The proportion of the contract price under Title III represented by direct labor used as a basis for the determination of increase or decrease in direct labor cost for each month will be that determined in item (a) above whether or not the actual direct labor cost expended by the contractor is above or below that proportion.

3. General.

(a) For the purpose of determining increases or decreases in contract prices, under Title III, rates of changes in average hourly earnings will be calculated to the nearest one-tenth of one percent.

(b) Payment for increases, or deductions for decreases in contract prices, under Title III, resulting from the above, will be deferred until performance under this contract is completed: Provided, however, That the War Department may make partial payments on account of such increases as may accrue from time to time, subject to such requirements as a condition precedent to such payments as the War Department may prescribe.

(c) The War Department reserves the right to substitute for the index for labor or material any other method or index should it at any time, in the judgment of the War Department,
98a appear that the specified indices do not reflect satisfactorily the increases or decreases in costs of material or labor under the contract.

Article III–F—Payments

The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified, payments will be made on partial deliveries accepted by the Government.

Article III–G—Partial Payments

1. Partial payments.—The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired and/or produced by it for the performance of Title III of this contract: Provided, That such partial payments shall not exceed 75 percent of the cost to the contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the contractor and which must be such as is satisfactory to the contracting officer: Provided further, That provision is not otherwise made in this contract for such partial payments.

2. Title to Property Where Partial Payments are Made.—The title to all property upon which any partial payment is made prior to the completion of Title III of this contract shall vest in the Government in its then condition forthwith upon the making of any such partial payment or payments: Provided, how-
99a ever, That nothing herein shall deprive the contractor of any further partial or final payments due or to become due hereunder; nor relieve the contractor and/or the Government of any of their respective rights or obligations under Title III of this contract.

3. Title to Property Where Partial Payments are Made and Default Occurs.—The Contractor agrees that in case of default by it in the performance of Title III of this contract or of other termination thereof before completion, such default or other termination shall ipso facto operate to vest in the Government title to all property acquired and/or produced by the Contractor for the performance of Title III of this contract, the title to which has not been previously vested in the Government under the provisions of Title III of this contract: Provided, That the provi-

sions of this section shall not be operative unless at least one partial payment has been made under Title III of this contract.

4. Fire Insurance.—The Contractor agrees to insure against fire all property in its possession upon which a partial payment is about to be made, such insurance to be in a sum at least equal to the amount of such payment plus all other partial payments, if any, theretofore made thereon, and further agrees to keep such property so insured, free of cost to the Government, until the same is delivered to the Government. Such property is to be considered as delivered to the Government upon its final acceptance. Such insurance policy or policies shall be taken out with a company or companies satisfactory to the Contracting Officer and shall provide that loss, if any, shall be payable to the Contractor and the Government as their respective interests may ap-
100a pear. All such policies shall be filed with the Contracting Officer and shall be subject to his approval as to form and substance.

5. Bonds.—Under the provisions of the Act of August 24, 1935 (49 Stat. 703; 40 U. S. C. 270a), the Contractor shall furnish at the time of execution of this contract an acceptable performance bond on United States Standard Form No. 25 in the amount of ten percent (10%) of the total contract price stated in Title III hereof and an acceptable payment bond on United States Standard Form No. 25-A in the amount of * * * Dollars ($ * * *).

Article III-H—Inspection

1. All material and workmanship shall be subject to inspection and test at all times and places, and, when practicable, during manufacture. In case any articles are found to be defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles, or require their correction. If the Contractor fails to proceed promptly with the replacement and/or correction thereof, the Government may, by contract or otherwise, replace and/or correct such articles and charge to the Contractor the excess cost occasioned the Government thereby.

2. If inspection and test, whether preliminary or final, is made on the premises of the Contractor or Sub-Contractor the Contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspections and tests by the Government shall
101a be performed in such manner as not to unduly delay the work. Special and performance tests shall be as described

in the specifications. The Government reserves the right to charge to the Contractor any additional cost of inspection and test when articles are not ready at the time inspection is requested by the Contractor.

3. Final inspection and acceptance of materials and finished articles will be made at the plant of manufacture prior to delivery. Final inspection shall be conclusive except as regard fraud, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies as are not in accordance with the specifications. In the event public necessity requires the use of guns not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

4. The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with manufacture, and no Ordnance materiél shall be submitted for the Inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the Contract standard.

Article III–I—Progress Reports

The Contractor agrees to furnish the Contracting Officer progress reports as required by him.

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Article III–J—Subcontracts

No Contract shall be made by the Contractor with any other party for furnishing any of the completed or substantially completed articles, or work herein contracted for without the written approval of the Contracting Officer.

Article III–K—Termination of Title III

If, in the opinion of the Contracting Officer upon the approval of the Secretary of War, the best interests of the Government so require, this Title III may be terminated by the Government, even though the Contractor be not in default, by a notice in writing relative thereto from the Contracting Officer to the Contractor. In case such notice be given the Contractor this Title III shall terminate, ipso facto, upon the giving of said notice. Upon such termination the Contractor shall forthwith deliver to the Government f. o. b. Contractor's plant in their then state of completion, all articles, spare parts, drawings, and other information and things called for herein, not previously delivered, and all work in

process, materials, and fabricated parts acquired and/or produced by the Contractor for the performance of this Title III, and the Government shall then forthwith pay the Contractor all amounts, if any, remaining due and unpaid under this Title III for completed articles, spare parts, drawings, and other information and things called for herein, theretofore completed, delivered, and accepted by the Government; and the Government shall also forthwith pay the Contractor for all partially completed articles,
103a spare parts, work in process, materials, fabricated parts, drawings, and other information and things to be so delivered hereunder, an amount to be computed as follows:

(a) There shall be determined by an audit conducted by or for the Contracting Officer, the total net amount of all expenditures and obligations made and/or incurred by the Contractor under this Title III in designing, manufacturing, and delivering said partially completed articles, spare parts, work in process, materials, fabricated parts, drawings, and other information and things so delivered hereunder.

(b) The Contractor and the Contracting Officer shall agree upon an estimate, based on the foregoing audit and any other pertinent data, of the net cost to the Contractor of fully completing and delivering said partially completed articles, spare parts, drawings, and other information and things called for herein, all in accordance with the requirements of this Title III had it not been terminated, including in such estimate all cost previously incurred under this Title III in designing and manufacturing said partially completed articles, spare parts, drawings, and other information and things, as well as those costs which would be required in the future for the entire completion and delivery thereof. In the event of the failure of the Contractor and the Contracting Officer to arrive promptly at such an agreement, said estimate shall be determined in the manner provided in Article IV–H of Title IV hereof for the adjustment of claims and disputes.

(c) The percentage which the foregoing item (a) is of item (b) shall then be determined and a sum of money equal to that
104a same percentage of the total contract price under this Title III (plus or minus any additions or deductions for changes), of such partially completed articles, spare parts, drawings, and other information and things, had they been completed, delivered, and accepted in accordance with the terms of this Title III, shall then be computed.

(d) The total of all payments, if any, previously made to the Contractor on account of such partially completed articles, spare parts, drawings, and other information and things, shall then be ascertained.

(e) The Contractor shall then be paid the same sum of money computed in accordance with (c) above, less the total of item (d).

Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the articles, if any, of this Title III applicable to Patent Infringements and Reproduction Rights shall remain in full force and effect.

Article III-L—Responsibility for Supplies Tendered

The Contractor shall be responsible for the articles or materials covered by this Title III until they are delivered at the designated point, but the Contractor shall bear all risk on rejected articles or materials after notice of rejection. Where final inspection is at point of origin but delivery by Contractor is at some other point, the Contractor's responsibility shall continue until delivery is accomplished.

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Title IV

Additional Provisions Relating to Entire Contract

Article IV-A—Walsh-Healey Act

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 U. S. C. 35–45), shall apply to the work under this contract:

"(a) The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

"(b) All persons employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the Contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the Contract; provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or Contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

"(c) No person employed by the Contractor in the man-
106a ufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the Contract shall be permitted to work in excess of 8 hours in any 1 day or in excess

of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

"(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the Contract.

"(e) No part of the Contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said Contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the Contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

"(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or under payment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the Withholding or recovery of such sums by the United States of America.

107a

"(g) The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the Contract work and shall keep such employment records as are required in the Regulations under the act available for inspection
108a by authorized representatives of the Secretary of Labor.

"(h) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000."

2. Stipulation (b) of "Representations and Stipulations pursuant to the Act of June 30, 1936," with respect to wages, is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

Article IV-B—Preference for Domestic Articles

1. In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of Title III, section 3, of the Act of March 3, 1933; 47 Stat. 1520 (U. S. Code, Title 41, section 10b).

109a 2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos	Nickel
Balsa Wood	Nickel Alloy (Monel Metal)
China Wood Oil (Tung Oil)	Platinum
Chromium	Rubber
Cork	Silk
Jute	Sisal
Kaurigum	Teak Wood
Lac	Tin

Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten, or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials, or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States.

Article IV-C—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article IV-D—Workmen's Compensation Laws

The Act of June 25, 1936 (49 Stat. 1938, 1939; 40 U. S. C. 290) provides that the several States have authority to make their workmen's compensation laws applicable to contracts for the construction, alteration, or repair of a public building or public
110a work of the United States, and the several States are vested with the power and authority to enforce such State laws on lands of the United States.

Article IV-E—Accident Prevention

The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, local, State, and municipal safety laws and building and construction codes.

Article IV-F—Officials Not To Benefit

No member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article IV-G—Covenant Against Contingent Fees

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to com-

missions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

111a

Article IV-H—Disputes

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $15,000.00 or less. When the amount involved is more than $15,000.00, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article IV-I—Approval Required

This contract shall be subject to the written approval of The Secretary of War and shall not be binding until so approved.

Article IV-J—Definitions

1. The term "Chief of Branch" refers to the Chief of Ordnance.

2. The terms "The Secretary of War" or "Chief of Branch," shall include their duly authorized representatives as the case may be, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" as herein shall include his duly appointed successor or his authorized representative.

112a

Article IV-K—Alterations

The following changes were made in this contract before it was signed by the parties hereto:

1. Last line Page 5, Paragraph (i) Section 1 of Article I-D delete "Thirteen Thousand Three Hundred Thirty-three Dollars ($13,333.00)." Substitute therefore "Eighty Thousand Dollars ($80,000.00)."

2. First line Page 6, Paragraph (i) Section 1 of Article I-D, after the word "installment" and before comma, insert "of Thirteen Thousand Three Hundred Thirty-three Dollars ($13,333.33) and thirty-three cents."

3. Sixth line, Article I-J, Page 9, delete "of the fixed fee."

4. Third line, page 16, insert word, * * * in blank space.

In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA.

Approval recommended:

By (s) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,

October 31, 1940.
Brig. Gen. U. S. Army (Contracting Officer).

(s) C. M. WESSON,
C. M. Wesson,
Major General,
Chief of Ordnance.

113a

MESTA MACHINE COMPANY,
(Contractor)

By (S) LORENZ IVERSEN, *President,*
Pittsburgh, Pennsylvania.
(Business Address)

Two Witnesses as to Execution by the Contractor:

/s/ CHAS. RAISIG,
Coraopolis, Pa.
(Address)

/s/ L. W. MESTA,
Pittsburgh, Pa.
(Address)

Approved Nov. 1, 1940.
By direction of the Secretary of War.

(S) ROBERT P. PATTERSON,
The Assistant Secretary of War.

I, J. M. Hutchison, certify that I am the Secretary of the Corporation named as Contractor herein: that Lorenz Iverson who signed this contracton behalf of the Contractor was then President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) J. M. HUTCHISON.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Lorenz Iversen, who signed this contract for the Mesta Machine Company had authority to

execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army,
Contracting Officer.

114a SCHEDULES A, B, C AND D

Include inter alia Machinery included in

Exhibit C. (p. 63a)

* * * * *

Contract No. W-ORD-486
Supplement 1

SUPPLEMENT TO COST-PLUS-A-FIXED-FEE EQUIPTING LEASE OF GOVERNMENT-OWNED EQUIPMENT AND FIXED-PRICE (LUMP-SUM) SUPPLY CONTRACT, WAR DEPARTMENT

Contractor: Mesta Machine Company, Pittsburgh, Pennsylvania

Contract for: Supplemental contract for the purpose of expediting the performance of the work under the principal contract through permitting the Contractor to rebuild, recondition, or adapt equipment, and to use equipment of its own manufacture upon terms satisfactory to the Contractor and the Government.

Place: West Homestead, Pennsylvania.

Estimated Cost of Equipping: Unchanged by this Supplement.

Payments to be made by and to the Finance Officer, U. S. Army, at Philadelphia, Pennsylvania.

115a The equipment, supplies, and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to, the following Procurement Authorities, the available balances of which are sufficient to cover the cost of same.

ORD 7404 P 99 A 0141-01.
NG 15416 P 57-3030 A 1405-01.
ORD 7640 P2-3030 A (1005)-105-01.
ORD 7640 P11-3030 A (1005)-105-01.

(s) L. H. CAMPBELL, Jr.
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

This supplemental contract is authorized by the Act of July 2, 1940 (Public No. 703, 76th Congress).

SUPPLEMENTAL CONTRACT

This Supplemental Contract, entered into this 21st day of February 1941, by and between The United States of America, hereinafter called "the Government", represented by the Contracting Officer executing this contract and Mesta Machine Company of the city of Pittsburgh, the state of Pennsylvania, hereinafter called "the Contractor," witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract which provides for the equipping of the Contractor's plant; the lease of Government-owned equipment; and the manufacture of guns, * * * said contract, bearing the
116a date of October 30, 1940, being further identified by the Government as "Contract No. W-ORD-486"; and

Whereas, the Government in the interest of National Defense, desires to expedite installation of equipment and production under the said contract; and

Whereas, in the equipping of the Contractor's plant under the terms of said contract, the Contractor is free but is not obligated to use any equipment or materials of its own manufacture if such equipment can be purchased by the Contractor; and

Whereas, said contract provides in effect that if the Contractor undertakes to furnish any materials or equipment of its own manufacture (despite the absence of obligation on its part under the contract so to do), it may be paid by the Government therefor no more than its actual expenditures as approved by the Contracting Officer and without profit other than that contained in the fixed-fee of $1.00 provided for the purchase or production and installation of all equipment; and

Whereas, the Contractor has expressed unwillingness to produce for or offer to the Government equipment or material of its own manufacture (although the same be available in Contractor's plant) under such terms and conditions in those cases where such equipment and materials suitable for use can be purchased; and

Whereas, the said contract does not expressly provide for the rebuilding, reconditioning, or adaptation of any machine tools, machinery, or equipment, including equipment furnished by the Government under the right reserved by it in said contract; and
117a Whereas the Contractor has expressed willingness to produce, rebuild, recondition or adapt materials and equipment in its own plant if it is permitted to do so upon the quo-

tation of prices which may include a profit to the Contractor, such prices to be subject however to the acceptance and approval by the Contracting Officer; and

Whereas the producing, rebuilding, reconditioning, or adapting of equipment and materials in the Contractor's own plant will result in the completion of the equipping of the plant in a substantially shorter period of time than would be possible if the Contractor purchased the equipment from others; and

Whereas it is in the interest of the Government to accomplish such a result; and

Whereas it has been determined to be in the interest of the Government to require the Contractor to cancel certain equipment orders placed by it with Government approval subsequent to the execution of said contract; and

Whereas in connection with satisfying such requirement of the Government the Contractor may be subjected to cancellation charges which should be provided for expressly in said contract; and

Whereas the accomplishment of such work under a contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law;

Now, therefore, the parties hereto do mutually agree that the said contract of October 30, 1940, shall be and is hereby modified in the following particulars:

1. Change Paragraph (b), Article I–C (page 4) to read:

118a (b) A fixed-fee in the amount of one dollar ($1.00), which shall constitute complete compensation for the Contractor's profit under this Title I, except such profit as may be included in Contractor's prices quoted under the provisions of Section 2, Article I–D as changed by this supplemental contract.

2. Change Paragraph (e), Article I–D (page 5) to read:

Losses and expenses not compensated by insurance or otherwise (including settlements made with the written consent of the Contracing Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable, including such charges as may be made to the Contractor because of its cancellation of orders for materials or equipment pursuant to written order of the Contracting Officer in accordance with Article I–J.

3. Change Section 2 of Article I–D (page 6) to read:

The Government reserves the right to furnish any equipment or materials for the completion of the work under this Title I upon so notifying the Contractor prior to any commitment by

the Contractor therefor. As soon as practicable the Contractor shall furnish for use in the performance of work under this Title I a Trepanning Lathe of its own manufacture complete with boring bars, cutting heads and holding fixture, provided that the price at which and the conditions upon which such lathe will be furnished are approved by the Contracting Officer. Likewise, in the work under this Title I, the Contractor shall, within
119a the limits of its capacity, furnish any other materials or equipment of its own manufacture which the Contracting Officer may find necessary or desirable to expedite the performance of such work, upon advising the Government in advance of such furnishing as to the prices at which and the conditions upon which such materials or equipment will be supplied. The Contractor shall rebuild, recondition or adapt certain Government-owned equipment furnished to the Contractor under the right reserved herein (including the equipment more particularly described in Schedule "E" which is attached hereto and specifically made a part hereof) provided that the price at which and the conditions upon which such rebuilding, reconditioning or adapting will be done, are approved by the Contracting Officer. The Contractor shall also be free (but shall not be obligated) to rebuild, recondition or adapt any other machine tools, machinery or equipment upon advising the Government in advance as to the prices at which and the conditions upon which such rebuilding, reconditioning or adapting will be done. In any event, the prices referred to in this Section 2 may include a profit to the Contractor and may be quoted without regard to the provisions of Section 5 of this Article I-D. If in any case within the scope of this section, the Government is able to obtain equipment, material or services of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so by informing the Contractor within ten (10) days after being advised of the Contractor's price for such equipment or material or services.

120a 4. Except as herein provided, the provisions of the said contract of October 30, 1940, shall continue in full force and effect.

5. This supplemental contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved.

6. The following alterations were made in this contract before it was signed by the parties hereto: None.

In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By (s) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

Approval Recommended February 24, 1941.

_____,
(Contracting Officer).

(s) C. M. WESSON,
C. M. Wesson,
Major General,
Chief of Ordnance.

MESTA MACHINE COMPANY,
(Contractor)
By (s) LORENZ IVERSEN, *President,*
Pittsburgh, Pennsylvania.
(Business Address)

121a Two Witnesses as to Execution by the Contractor:
(S) R. E. SMITH, Jr.,
Ben Avon, Pa.
(Address)
(S) CHAS. RAISIG,
Coraopolis, Pa.
(Address)

Approved Mar. 1, 1941.
By direction of the Secretary of War.
(S) ROBERT P. PATTERSON,
Robert P. Patterson,
Under Secretary of War.

I, J. M. Hutchison, certify that I am the Secretary of the Corporation named as Contractor herein; that Lorenz Iversen who signed this contract on behalf of the Contractor was then President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) J. M. HUTCHISON.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Lorenz Iversen, who signed this contract for the Mesta Machine Company had authority to

execute the same, and is the individual who signs similar
122a contracts on behalf of this corporation with the public generally.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army,
Contracting Officer.

SCHEDULE "E"

Government-Owned Equipment to be Rebuilt or Reconditioned

Eight (8) Gun Boring Lathes (42" x 60'-0"), identified as follows: Lathe No. WV—307, Lathe No. WV—517, Lathe No. WV—524, Lathe No. WV—867, Lathe No. WV—1876, Lathe No. WV—1948, Lathe No. WV—1949, Lathe No. WV—1958. Two (2) Rifling Machines.

123a *Exhibit 2*

THE AMERICAN TOOL WORKS COMPANY

MANUFACTURERS OF LATHES, RADIAL DRILLS, SHAPERS

Main Office and Works, Cincinnati, U. S. A.

OCTOBER 10, 1940.

MESTA MACHINE CO.,
P. O. Box 1466, Pittsburgh, Pa.
Attention: Mr. J. D. Connolly,
Subject: Gun Boring and Turning Lathes.

GENTLEMEN: Confirming the conversations which have taken place between our respective engineers, we are pleased to quote you f. o. b. cars Pittsburgh on three Gun Boring and Turning Lathes, according to specifications in ditto form attached hereto, the price being $75,000 per lathe.

Terms of payment are to be $5,000 with the order, $5,000 in ninety days and $5,000 in one hundred and eighty days, balance upon delivery.

Trusting we may be favored with your order, we remain
Very truly yours,

THE AMERICAN TOOL WORKS COMPANY,
By L. W. SCOTT ALTER,
President and General Manager.

LWSA/w.
JBC.
file JC.

124a *Exhibit 3*

Office

MESTA MACHINE CO.

Pur Order No. 13651.
S. O. No. 93034.

HOMESTEAD, PA., *Nov. 21, 1940.*

THE AMERICAN TOOL WORKS CO.,
Cincinnati, Ohio.

CR

3—30" Gun Boring and Turning Lathes as per your quotation of October 10, 1940. Price each f. o. b. Homestead, Pa., $75,000.00

3

225,000.00

Delivery—1—January 15, 1941; 1—February 15, 1941; 1—February 25, 1941.

353.

RC.

Approved Under Contract W-ORD-486.

(s) JAMES L. GUION,
James L. Guion,
Lt. Col. Ord. Dept., U. S. A.,
Contracting Officer's Representative.

31271

125a *Exhibit 4*

RECEIVING REPORT

War Department. Q. M. C. Form No. 431. Revised April 6, 1931. RRD—Voucher No. 11301-42. Stock Record Account. No. sheets 1. Sheet No. 1.

Received 6-21-41 by Pittsburgh Ordnance District.

Received from Mesta Machine Company, West Homestead, Pa.

Delivered by x. Car No. x. Seal No. x. Contract No. W-Ord-486.

How purchased: F. o. b.—Destination. P. O. 13651, S. O. 93034.

Govt. B/L No. x. Date x. Contracting office, Chief of Ordnance.

F. o. b. point W. Homestead, Pa. Shipping point W. Homestead, Pa. P/A No. .....

Shipped to Mesta Machine Company, West Homestead, Pa. Payment by Finance Officer at Philadelphia, Pa.

Shipment No. 1, Partial.

126a ARTICLES INSPECTED, ACCEPTED, AND RECEIVED

Number Pkgs.	Quantity	Stock No.	Articles	Unit	Unit cost	Total cost
.....	1	.....	Lathe, American Tool Works combination boring & turning 30". * * * and complete with all electrical equipment. No. 01100.....	.....	.....	$75,000.00

I certify that the articles listed on this report were inspected and accepted by me, and that they conform to the contract requirements; that the articles listed on the back of this report
127a were rejected for the reasons stated, and that the foregoing report is correct.

SCOTT R. DICKINSON,
1st Lt. Ord. Dept.

Date 7-8-41.
Approved:

Date 7-8-41.
JOSEPH E. FINN,
Captain, Ord. Dept.
31271

I certify that the articles listed on this report were received by me in the quantity and condition stated, and that the same have been taken up on the stock record cards of this station.

SAMUEL B. ROTHARMEL,
1st Lt. Ord. Dept., Property Officer.

Date 7-8-41.

Indicate Distribution By Check Opposite Proper Designation

1. Voucher to Stock Record Account.
2. Finance Officer who Pays Account.
3. File with Purchase Record.

128a *Exhibit 5*

THE AMERICAN TOOL WORKS CO.
CINCINNATI, U. S. A.

Customers Ord. No. & Date 13651 11/21/40.
Invoice Date June 7/41.
Invoice No. ------.
Shipper's Order No. ------.
Shipped to Destination, Mesta Machine Co., Homestead, Penna.
Terms, Net Cash.

One 30" Gun Boring & Turning Lathe, as per our quotation of October 10, 1940, $75,000.00.
Emergency Defense Contract.
Please Receipt and Return Today.
The American Tool Works Co.
Paid July 7, 1941.
Per A. C. Nolte.
S. O. 93034.
Vr. 60310.

31271

129a *Exhibit 6*

MESTA MACHINE COMPANY

PITTSBURGH, PA., U. S. A.

Contract No. W-Ord-486, dated 10-30-40.
Refer to Invoice No. 31271.
Invoice Date, June 30, 1941.
Vendor's Nos. 93325-P.
Sold to War Department, James L. Guion, Lt. Col. Ord. Dept. U. S. A., Contracting Officer, Pgh. Ordnance District, 1212 Chamber of Commerce Bldg., Pittsburgh, Pa.
From Homestead, Pa., F. o. b. Our Works.
Terms: per contract. (Quadruplicate.)
Article I-D Reimbursement for Contractor's expenditures under Title I, exclusive of Paragraph (i) of Section 1:
Summary of: Accrued costs for the month of June 1941 applying against Contract W-Ord-486 dated October 30, 1940: Equipment: The American Tool Works Co., P. O. 13651, S. O. 93034, 1 30" Gun Boring & Turning Lathe, $75,000.00.
Goods and/or Service covered by this Invoice were produced in accordance with the Applicable Provisions of the Fair Labor Standards Act of 1938.

130a *Exhibit 7*

War Ordnance, 1202 Chamber of Comm. Bldg., Pittsburgh, Pa., July 10, 1941.
Mesta Machine Company, Pittsburgh, Pa., 1202 Chamber of Comm. Bldg., Pgh. Ord. Dist.
June 30, 1941—Article I-D Reimbursement for contractor's expenditures under Title I, exclusive of paragraph (i) of Section 1:

Summary of accrued costs for the month of June for equipment:

131a For itemized invoice #31271—P. O. 13651 rec. inv. The American Tool Works Co. attchd., $75,000.00; 1st part. payment, $75,000.00.

Mesta Machine Company certified invoice attached.

W. Ord. 486, 10/30/40, $75,000.00, 4.

JOHN D. POTTER,
1st Lt., Ord. Dept., U. S. A.

JOSEPH E. FINN,
Capt., Ord. Dept., Auditor.

210/11005, ORD 7889 P 11-3030 A 1005-01 OS&SA 1940-41, $75,000.00 $75,000.00.

75,000.00

31271

132a *Exhibit 8*

MESTA MACHINE COMPANY
General Office and Works: West Homestead, Pa.
Mail Address, P. O. Box 1466
PITTSBURGH, PA.

DECEMBER 21, 1940.

Colonel JAMES L. GUION, *Executive Officer,*
Pittsburgh Ordnance District,
1212 Chamber of Commerce Building,
Pittsburgh, Pennsylvania.

Subject: Trepanning Lathe

DEAR SIR: Unless otherwise specified, the following terms and conditions will apply: Terms: 80% monthly as the work progresses: 10% upon shipment: balance not later than 60 days after shipment. Prices will remain in effect for 15 days from this date and do not include foundation bolts and washers, electrical equipment, or sales tax. Prices allow published tariff freight rate of this date to the point specified, any change in rate being for buyer's account. Purchaser will pay transportation charges from our plant to destination on such motors as are mounted by us at our works. All deliveries are contingent upon strikes, accidents, delay of carriers, or other causes beyond our control.

In connection with the manufacture of the * * * guns under Ordnance Contract No. W-ORD-486, we have available,

partially completed, a Trepanning Lathe * * * which
133a can be used to advantage. For your approval we are pleased to submit the following quotation on the machine and the required size of the boring tools.

	Price
One (1) Trepanning Lathe, including Motors and Control, not including Boring Bars or Cutting Heads	$46,350.00
Two (2) 14" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	6,213.00
Two (2) 13⅛" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	6,020.00
Two (2) 12" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	5,800.00
Total Price	64,383.00

In addition, there will be required an especially designed holding fixture, and we will submit our quotation on this equipment after the details are completed.

The prices specified are f. o. b. cars our works, West Homestead, Pennsylvania.

(Sheet No. 2)

134a Terms of Payment: Net cash 30 days after completion of the machine.

Very truly yours,

MESTA MACHINE COMPANY,
W. W. POWELL,
General Sales Manager.

WCWilson/rr.

March 28, 1941. Approved under Contract W-ORD-486.

(S) JAMES L. GUION,
James L. Guion,
Lt. Col., Ord. Dept., U. S. A.,
Contracting Officer's Representative.

135a *Exhibit 9*

RECEIVING REPORT

War Department. Q. M. C. Form No. 431. Revised April 6, 1931. Voucher No. RRD 11493-42. Stock Record Account. No. sheets 1. Sheet No. 1.

Received 9-17-41 by Pittsburgh Ordnance District.

Received from Mesta Machine Company, West Homestead, Pa.

Deliver by X. Car No. X. Seal No. X. Contract No. W-ORD-486 Supp. 1.

How purchased: F. o. b.—Origin Mesta Machine Company, Est. 12/31/40.

Govt. B/L No. X. Date X. Contracting office, Chief of Ordnance.

F. o. b. point West Homestead, Pa. Shipping point X.

Shipped to Mesta Machine Company, West Homestead, Pa. Payment by Finance Officer at Philadelphia, Pa.

Shipment No. 1 Final.

136a Articles Inspected, Accepted, and Received

Number pkgs.	Quantity	Stock No.	Articles	Unit	Unit cost	Total cost
.....	1	.....	Lathe, Trepanning	.....	$46,550.00	
.....	2	.....	Bars, boring, 14" dia. w/1 set cutting heads and 2 spare heads	.....	6,213.00	
.....	2	.....	Bars, boring, 13⅛" dia. w/1 set cutting heads and 2 spare heads	.....	6,020.00	
.....	2	.....	Bars, boring, 12" dia. w/1 set of cutting heads and 2 spare heads	.....	5,800.00	
						64,583.00

I certify that the articles listed on this report were in-
137a spected and accepted by me, and that they conform to the contract requirements; that the articles listed on the back of this report were rejected for the reasons stated, and that the foregoing report is correct.

SCOTT R. DICKINSON,
1st Lt., Ord. Dept.

Date 10–17–41.

Date 10–20–41.

Approved:

JOSEPH E. FINN,
Major, Ord. Dept.

I certify that the articles listed on his report were re-
137a ceived by me in the quantity and condition stated, and that the same have been taken up on the stock record cards of this station.

SAMUEL B. ROTHARMEL,
1st Lt., Ord. Dept.,
Property Officer.

Date 10–20–41.

138a *Exhibit 10*

MESTA MACHINE COMPANY

PITTSBURGH, PA., U. S. A.

Customer's Order No. & Date ..... Requisition No. .....
Contract No. W–Ord–486 dated 10–30–40 & Supplement 1 dated

2-21-41. Refer to Invoice No. 32293. Invoice Date Sep. 30, 1941. Vendor's Nos. 93064, 68, 88, 93251, 57–61 incl. —C — 5L.

Sold To War Department, James L. Guion, Lt. Col. Ord. Dept. U. S. A., Contracting Officer, Pgh. Ordnance District, 1212 Chamber of Commerce Bldg., Pittsburgh, Pa.

Shipped to and Destination. Date Shipped: Car Initial and No. From Homestead, Pa. How Shipped and Route. F. O. B. Our Works. Terms: per contract. Prepaid or Collect? (Quadruplicate.)

Quantity	Description	Weight	Price	Extension	Amount
	Supplement 1 to Contract W-ORD-486; Change Section 2 of Article I-D, Paragraph 3:				
1	Trepanning Lathe including Motors and Control, complete with Boring Bars and Cutting Heads			$64,583.00	93,088
1	Holding Fixture for 72" Trepanning Lathe			2,950.00	93,257
	Extending & Rebuilding Two (2) Rifling Machines			13,200.00	93,068
2	Steel Rifling Bars for Rifling Machines			3,945.00	93,261
	Extending & Reconditioning Eight (8) 42" x 60'-0" Niles-Bement-Pond Boring Lathes shipped to our works from Watervliet Arsenal			83,500.00	93,064
3	Drills Bars			2,715.00	93,251
12	Boring Bars for Combination Boring & Turning Lathes, & 42" x 60' Niles-Bement-Pond Boring Lathes			11,550.00	93,260
	Additional Parts for equipping One (1) Gun Boring Lathe for Boring Hoops			350.00	93,258
6	Reamers for Boring Hoops			5,400.00	188 193.00

93259. Goods and/or service covered by this invoice were produced in accordance with the applicable provisions of the Fair Labor Standards Act of 1938.

32293

140a

Exhibit 11

War Ordnance, 1202 Chamber of Comm Bldg., Pittsburgh, Pa. Oct. 4, 1941.

Mesta Machine Company, Pittsburgh, Pa., 1202 Chamber of Comm Bldg., Pgh. Ord. Dist.

Sept. 30, 1941—Equipment as per itemized invoice #32293 attached $188,193.00.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to Procurement Authority enumerated hereon, the available balance of which is sufficient to cover the cost thereof.

Complete payment, $188,193.00.

Mesta Machine Company certified invoice attached. W. Ord. 486—Supp #1.

JOHN D. POTTER,
1st Lt., Ord. Dept.

$188,193.00. Joseph E. Finn, Major, Ord. Dept. Auditor. 210/20141 Ord 7404 P 2-0290 A. 0141-02 E. P. of E. & S. for National Defense 1940-42, $188,193.00.

188,193.00

32293

141a *Exhibit 12*

SHIPPING TICKET

War Department. Q. M. C. Form No. 431. Revised Jan. 3, 1935. Consignor's Vou. No. Memo. Consignee's Vou. No. ------. Number of Sheets 1.

Consignor: Property Officer, Pittsburgh Ordnance District, 1202 Chamber of Commerce Bldg., Pittsburgh, Pa. July 9, 1942, rcm.

Date Shipped or Delivered October 20, 1941.

Ship to Mesta Machine Company, West Homestead, Pa. Authority or Req. No. ------. Contract W-ORD-486.

	Quantity		Stock No.	Article	Unit	Unit cost	Total cost
	Ordered	Shipped					
	1	1	.....	RRD #11489-42—Machine, Rifling, Govt. Serial #WV-432. PG 10059 Mesta 09901 S. O. #93068	Ea.	.....	.....
142a	1	1	.....	Machine, Rifling, Govt. Serial #WV-1553 PG 10058 Mesta 09900 S. O. #93068.	do	.....	.....
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-517 Ser. 3387 PG 10046 Mesta 01104 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-524 Ser. 3390 PG 10047 Mesta 01105 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1876, Ser. 3386 PG 10050 Mesta 01108 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1948 Ser. 3385 PG 10045 Mesta 01103 S. O. 93064.			
143a	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-307 Ser. 3384 PG 10051 Mesta 01100 S. O. 93064—Memorandum Receipt.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1958 Ser. 3388 PG 10048 Mesta 01106 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1949 Ser. 3383 PG 10049 Mestal 01107 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Seria #WV-867 Ser. 3393 PG 10052 Mesta 01110 S. O. 93064.			

Articles listed in column "Ordered" have been received unless otherwise noted in column "Shipped."

144a *Exhibit 13*

PROPERTY OF U. S. GOVT.

PG 12222

PITTSBURGH ORDNANCE DISTRICT

Certificates

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a cofrect transcript of the same.

GEO. D. KAHN,
Official Reporter.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

HENRY ELLENBOGEN, *Judge.*

145a In Court of Common Pleas of Allegheny County

Opinion and Order

Filed January 18, 1943

Opinion by ELLENBOGEN, J.

This case is before the court on an appeal by the Mesta Machine Company from a final assessment made by the Board of Property Assessment, Appeals, and Review of Allegheny County for ad valorem property taxes, pursuant to the Act of May 22, 1933, P. L. 853, Article 2, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1, 72 PS Suppl. 5020-201. The appeal was filed pursuant to Section 12 of the Act of June 21, 1931, P. L. 626.

This case came before us on a petition of the United States of America, asking leave to intervene, filed at the request of the Secretary of War and at the direction of the Attorney General of the United States. We granted the petition and allowed the United States of America to intervene. In the opinion which we filed at that time we stated expressly that our order granting leave to intervene must not be taken as an adjudication of the question whether the assessment by the Board of Property Assessment, Appeals and Review, was valid or contrary to law. Thereafter, the case came on for hearing on the validity of the assessment,

facts were stipulated by the parties, and testimony was taken. This record is now before us for adjudication.

The question here presented is whether the assessment of certain machinery, owned by the United States and leased by it to the Mesta Machine Company, as a part of the real estate
146a of the Mesta Machine Company, is valid. The precise question here presented is a novel one which has never been adjudicated. The case is important because similar arrangements on a vast scale have been entered into by the United States in this and in other States of the Union. We are advised that the case before us is a test case which will determine whether billions of dollars of property belonging to the United States may be assessed for the payment of local taxes.

The facts are not in dispute. On October 30, 1940, the United States of America entered into a written contract with the Mesta Machine Company, a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, to manufacture for the United States a quantity of large field guns. As a part of the contract, provision was made for the acquisition of special machinery and machine tools necessary to enable the Mesta Machine Company to produce the guns, and for installing the machinery in buildings owned by the company and located in its manufacturing plant in the Borough of West Homestead, Allegheny County, Pennsylvania. A copy of the entire contract, with the exception of certain confidential details which have been deleted, is attached to the petition of the United States for leave to intervene, and was filed as an exhibit in the case. The contract is on a cost-plus and a fixed-fee basis, and deals in part with the production or procurement and installation in the plant owned by Mesta Machine Company of certain machinery and machine tools necessary for the manufacture of guns. Some of the machines (eight Gun-Boring Lathes) were always owned by
147a the United States and were shipped by it to the Mesta plant at West Homestead from its Arsenal at Watervliet, New York. The other machines and equipment were purchased or manufactured by the Mesta Machine Company and sold by it to the United States of America. All of the machinery and equipment are now owned by the United States and have been leased by the Government to Mesta Machine Company for an indeterminate period (until all the guns under the present and future orders have been manufactured), at a rental of $1.00. This machinery and equipment was installed in buildings owned by Mesta Machine Company in West Homestead, Allegheny County, Pennsylvania, and was affixed to the floor of the buildings by bolts and nuts. The contract provides that upon its termination Mesta Machine Company shall remove the machinery and equipment

from its plant and shall ship the same, at the expense of the Government, to a point designated by a representative of the War Department.

The real property of the Mesta Machine Company, consisting of land, buildings, and machinery located therein, was valued and assessed in the triannual assessment made for the years 1940, 1941, and 1942. In February 1942 the Board of Property Assessment, Appeals, and Review revised the assessment and increased it by adding to the valuation, among other items, the value of the machinery in question, appraised at $618,000. Upon refusal of the Board to set aside the assessment as being contrary to law, this appeal was taken.

To complete the statement of fact, reference should be had to Article I–D (g) of the contract between Mesta Machine and the United States, which provides that the Government of the
148a United States shall reimburse the Mesta Machine Company for any "State or local taxes" which it may have to pay on account of said machinery and equipment. The applicable part of the Article reads as follows:

"Article I–D:

"1. The Contractor shall be reimbursed in the manner hereinafter described for ----------

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"(g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

On the basis of these facts, the Government and the Mesta Machine Company contend, first, that the machinery and equipment in question are personal property and therefore not subject to an assessment for real estate taxes, and, second, that they are not taxable because they are owned by the United States of America.

We shall first deal with the question whether the machinery involved is real estate, as that term is used in the applicable statutes in force in the Commonwealth of Pennsylvania, or whether it is personal property and as such not subject to the tax.

149a The property involved was assessed as a mill or manufactory pursuant to the provisions of the Act of May 22, 1933, P. L. 853, Art. 2, Sec. 201, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, 72 PS. Suppl. 5020–201, reading as follows:

"The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan-yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

This section deals with the assessment and taxation of real estate for local tax purposes. It specifically states that "all" real estate shall be subject to assessment and taxation. To eliminate any doubt as to what is meant by "real estate" the section enumerates various types of property which are considered real estate and are subject to taxation as such. Mills and manufactories of all kinds are included in the enumeration as real estate, Sec. 201 (a):

"All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, * * *."

In separately enumerating houses, lands, mills and manufactories, and classifying them all as real estate, the Legislature
150a very clearly indicated that by a manufactory it meant a complete establishment consisting of land, buildings, and the machinery which rendered the structure a manufactory, and we so hold. This is the only reasonable construction of the language used in Section 201 (a) and is now so well established by the authorities that it is no longer open to question.

Section 201 (a) of the Act of July 2, 1941, P. L. 219, is identical with the corresponding sections of the Act of April 29, 1844, P. L. 486, Section 32, and the Act of April 15, 1834, P. L. 509.

As early as 1828, prior even to the Act of 1834, it was held by the Supreme Court of Pennsylvania in Gray v. Holdship, 17 S. & R. (36 Pa.) 413, that a copper-kettle or boiler in a brewhouse is a part of the freehold. It was there said that,

"From the adjudged cases on this subject I think we are warranted in saying, that everything put into and forming part of a building, or machinery for manufacturing purposes and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones, and even the bolting-cloth, are parts of the mill and of the freehold, and cannot be levied on as personal property. * * *"

It is clear that a private arrangement or contract between the owner of the land and the owner of the machinery which treats the machinery as personal property and permits its removal from the building at the termination of the contract cannot change the effect of a public statute, and therefore all the machinery and

equipment which are located in a building and are essential or necessary for manufacturing purposes must be deemed real
151a estate for the purpose of the assessment and levying of local taxes under Section 201 of the Act of 1941 and corresponding sections of the prior acts.

In Patterson v. Delaware County, 70 Pa. 381 (1872), it was held that machinery in a factory was properly taxed as real estate as a part of the factory.

In Bemis v. Shipe, 26 Pa. Superior Ct. 22 (1904), it was held that under the Act of April 15, 1834, P. L. 509,[1] a stationary sawmill in which boilers were set in masonry and which was erected upon lands belonging to another, is liable to taxation as real estate for county and township purposes, in spite of the fact that the owner of the sawmill had the right to remove all buildings erected by him upon the expiration of the lease.

In Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Ct. 384 (1911), the defendant leased land owned by him for a factory building to a tenant for a term of three years. The tenant brought certain of his own machinery to the premises which remained the personal property of the tenant and was removable by him at the end of the term. The court held that the machinery was taxable as real estate against the owner of the land.[2]

152a In Pennsylvania Stave Company's Appeal, 236 Pa. 97 (1912), it was held that a manufacturing plant consisting of a sawmill, offices, sheds, and barn, was taxable as real estate although the structures were erected by the tenant upon land leased by him for a term of years with a right in the lessee to remove the buildings and machinery at the end of the term, and in Cowanshannock Coal & Coke Company's Tax Assessment, 283 Pa. 122, it was held that where a coal company which owns and operates a private railroad as a necessary part of its equipment and mining operations on land on which it has an interest such railroad is properly included in the tax assessment as a part of the real estate, although the fee to the land was not in the coal company.

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[1] Bemis v. Shipe, 26 Pa. Superior Ct. 22, 46:
"So far as the county and township authorities are concerned, the mills of the plaintiffs and so much of the land as they may occupy in connection therewith are clearly real estate and are to be assessed and taxed as such, regardless of the agreement between them and the owner of the land, by which, as between themselves, the buildings erected by the plaintiffs are to be regarded as personal property. * * *"

[2] Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Ct. 384, 400-401:
"* * * the inclusion of the machinery in the building as a part of that which composed the real estate and contributed to its value must be regarded as bringing it within the category of realty for purposes of taxation. From the point of view of the taxing authorities the property assessed constituted a manufactory. It had all the features and qualities of that kind of real estate and it was evidently the intention of the legislature when providing for the assessment of such property that it should be regarded as an entirety. Mills and manufactories of all kinds are expressly enumerated among the things to be taxed as real estate and these necessarily include the machinery essential to the existence and operation of such establishments. * * *"

The Government and the Mesta Machine Company contend, however, that the machinery is not taxable as real estate where the owner of the machinery has no interest or estate, either as *owner or as lessee, in the land and building* in which the machinery is located. Statements to that effect are contained in some of the adjudicated cases that have been referred to, but we do not
153a believe that they correctly state the law. The appellants cite Dravo Contracting Co. v. Grambling, 45 Pa. Superior Ct. 72 (1910), where a contracting company entered into a contract with a coal company to sink a mining shaft and air shaft in the land owned by the coal company. In order to carry out this construction contract, it was necessary for the contractor to install boilers, one hoisting engine, one compressor, a steel tower and a dynamo, which were all to be removed at the completion of the construction contract. The lower court held that this equipment was a part of the real estate and as such was properly assessed for purposes of local taxation under the Act of April 15, 1834, and its amendments. This decision was reversed by the Superior Court. It would seem that the assessment in that case was not against the Maryland Coal Company, the owner of the coal mine, but against the Dravo Contracting Company, whose property was merely temporarily on the land for the sole purpose of carrying out a construction contract. The assessment should have been against the owner of the fee and not against the owner of the machinery: Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Court 384. But the Superior Court very properly held that the machinery was not taxable as real estate because it was not on the land as a part of the equipment of the coal mine but was there "for a special purpose, and merely temporarily." It would be absurd to hold that construction equipment located on land temporarily for the purpose of erecting a structure or sinking a shaft was a part of the real estate and taxable as real estate. This, in our opinion, is the real basis for the decision in the Dravo
154a Contracting Company case, and not the fact that the Dravo Company had no estate in the land. It is true that in his opinion Justice Beaver referred to the fact that the construction company had no estate in the land, but we believe that he did so only for the purpose of emphasizing that these articles were placed on the land merely temporarily and for a very narrow purpose.

To hold otherwise would enable the owner of a mill or manufactory to escape the assessment and payment of real estate taxes upon that part of the value of a plant which is represented by machinery located therein by simply obtaining the necessary machinery under a bailment lease instead of by purchase. The owner of a factory must pay local taxes upon machinery located in the

factory whether the machinery is owned by him or brought upon the premises by a tenant: Guthrie v. Pgh. Dry Goods Co., supra. In view of this principle of law, to permit the owner of land to escape such taxes where the machinery is upon the same premises but held under a bailment lease, would be an unjust discrimination and would be a violation of Section 1, Article 9, of the Constitution of Pennsylvania, which provides that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, * * *."

The machinery here involved was not placed upon the premises of the Mesta Machine Company temporarily but was placed there to enable the Mesta Machine Company to carry out the purpose for which it had been organized, to wit, the manufacturing of heavy equipment. The fact that in this particular case the
155a equipment involved is heavy guns does not constitute "a special purpose" in the sense in which that word is used in the Dravo Contracting Company case. The placing of machinery in a building for manufacturing purposes for which the building had been erected is not a special purpose that is foreign to that building but constitutes the normal use of the building and real estate involved.

In connection with its contention that the owner of the machinery must have an interest or estate in the land, the Mesta Machine Company cites the case of Midvale Steel & Ordnance Co. v. Eddystone Borough, 15 Del. Co. 93. In that case the tax was assessed against the Remington Arms Company which was neither the owner of the machinery nor of the land and buildings. The assessment was therefore properly set aside. We have also looked at all the other cases in which the statement was made that the owner of the machinery had no estate in the land and we believe that in none of them was that fact decisive.

We are, therefore, of the opinion that the machinery involved here is real estate as that term is used in the Act of April 15, 1834, and its amendments, including the Act of July 2, 1941, and that the mere fact that title to the machinery is not in the Mesta Machine Company but in a third person is not, in itself, sufficient to exempt the machinery from the statute; likewise it is not controlling that, as between the parties, the machinery involved may be considered personalty.

This brings us to the second question involved in the case before
us, whether the fact that the machinery involved is owned
156, by the United States of America renders it non-taxable by the Commonwealth of Pennsylvania and its local subdivisions.

That the taxing by a state or any of its subdivisions of property owned by the United States of America and used by it in carrying

out a constitutional function constitutes a violation of the Constitution of the United States and of the principle of dual sovereignty upon which that Constitution is based, is no longer open to debate. The assessment and levy of such a tax is clearly invalid.

Since the famous case of McCulloch v. State of Maryland, 4 Wheat. 316 (1819), it has been consistently held that property of the United States, being the property of all the people should be subjected to the jurisdiction of that Government only which belongs to all the people and that therefore the property and instrumentalities of the United States of America are, "constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose, including that of taxation."[3]

In Van Brocklin v. State of Tennessee, 117 U. S. 151, 155 (1885), this principle is appropriately expressed, as follows:

"The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All
157a subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. * * *"

In the Van Brocklin case a tax levied by the State of Tennessee upon lots of ground which had been acquired by the United States on tax sales and which had been sustained by the Supreme Court of the State of Tennessee, was set aside and it was held that the lots, as property of the United States, were exempt from taxation by the State and its municipal subdivisions.[4]

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[3] McCulloch v. State of Maryland, 4 Wheat. 316, at 319.

[4] Van Brocklin v. State of Tennessee, 117 U. S. 151, 178–179:

"The latest utterance of this court upon this subject is in a case decided at the present term, in which Mr. Justice Bradley, delivering the judgment of the whole court, upon a question of the extent of the taxing power of a State, said: 'We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States.' Coe v. Errol, 116 U. S. 517, 524."

158a In U. S. v. Rickert, 188 U. S. 432, it was decided that property held by the United States in trust for Indians under the Indian Allotment Act was not taxable by a municipality. A similar ruling was made in Dewey County v. United States, 26 F. 2d 434, and in Lincoln County v. United States, 26 Fed. 2d 435. In Port Angeles Western R. Co. v. Clallam County, 20 F. 2d 202 (1927), it was held that a railroad belonging to a corporation created by the United States for war purposes and wholly owned by it is not subject to taxation. In Irwin v. Wright, 258 U. S. 219, it was held that land of the United States entered within a reclamation project is not subject to state taxation before the equitable title has passed to the entryman and all conditions of the Acts of Congress have been complied with, since "no State can tax the property of the United States within its limits."

In the case of People ex rel. Donner-Union Coke Corp. v. Burke, 204 App. Div. 557, 198 N. Y. S. 601, affirmed 236 N. Y. 650, 142 N. E. 320, the Donner-Union Coke Corp. in 1918 entered into a contract with the Government to build for the United States a byproduct coke plant for the production of toluol
159a and to lease the land upon which it was erected to the United States. Title to the plant was vested in the United States. After the termination of the war, to wit, in June 1920, a contract was entered into between the corporation and the Government pursuant to which the company was to acquire ownership of the plant by paying the purchase price of about five and a half million dollars in twelve equal annual installments. Title to the plant was to remain in the Government until all installments had been fully paid. In 1921 the assessor of the City of Buffalo assessed the land and improvements of the company, including this plant, for purposes of local taxation. The assessment was set aside by the Supreme Court of New York and the decision affirmed by the Court of Appeals. In 1925 the Legislature of the State of New York passed an Act of Assembly specifically designed to make the equitable interest of the corporation in the plant taxable. Pursuant to that Act, the interest of the company in the plant was again assessed, but the assessment was again set aside by the Supreme Court of the State of New York. It was urged that "the government simply holds the legal title to the property assessed as security for the payment of the purchase price to be paid, * * * " and that "the realtor is in fact the equitable owner of the property, although the bare legal title remains in the United States." But the court held that the tax was void because it was

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Pages 179–180:
"* * * To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States."

a tax on the legitimate functions of the Government, embarrassed the Government in getting the best sales price for the plant,
160a and retarded, impeded, and burdened the national government in its operation.[5]

It is clear that the contract between the Mesta Machine Company pursuant to the terms of which the machinery involved has been installed in the buildings owned by the Mesta Machine Company at West Homestead, Pa., was entered into by the Government for the purpose of obtaining guns necessary for the war with Germany, Japan, and Italy. The contract before us was, therefore, entered in execution of a constitutional purpose and indeed for the purpose of meeting the primary obligation imposed upon the Government, to defend the people of the United States against aggression and to carry the war upon which it is lawfully engaged to a successful and victorious conclusion. While the assessment and tax involved here is nominally against the Mesta Machine and not against the Government of the United States, its effect is to increase the price which the Government must pay for the
161a manufacture of the heavy guns which it needs. The tax in question undoubtedly impedes and burdens the National Government in its most vital operations, is clearly in violation of the Constitution of the United States, and is utterly void and of no effect.

In making this decision we are not influenced by the fact that under its contract with the Mesta Machine Company, the Government is under obligation to reimburse the company for the amount of the tax involved here if the assessment and tax should be sustained. This obligation is purely contractual, was voluntarily assumed by the Government, and therefore cannot be urged by the United States in resisting the assessment and tax: Alabama v. King & Boozer, 314 U. S. 1, and Curry v. U. S., 314 U. S. 14.

We are in sympathy with the argument that where property such as the machinery involved here enjoys the police and fire protection, and highway, sewer, and other municipal services, it should in fairness bear its pro-rata share of the local taxes, raised for the purpose of supplying these services. The courts, however, are unable to permit the assessment of Government property unless the Congress, by proper legislation, consents thereto, and the County and Borough authorities must address themselves to the

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[5] People ex rel. Donner-Union Coke Corp. v. Burke, 204 App. Div. 537, 198 N. Y. S. 601, 217 N. Y. S. 803, 808–809:

"* * * If the government, in selling the coke plant to the realtor or to any other party, was required to sell on the condition that the purchaser should pay taxes on the property agreed to be bought at its full value, notwithstanding the government retained title until the final payment was made, it follows as matter of course such a purchaser would be unwilling to pay as large a sum for it as it would if the property bought were free from taxation. The federal government under such conditions would be embarrassed in getting a price equal to the price it otherwise could obtain, and this would retard, impede, and burden the national government in its operations, just as was held it did in the attempted taxation in the case of the Astoria Light, Heat & Power Corporation."

Congress, if they desire relief. We might add that it would be equitable that the Congress of the United States pass legislation providing for the payment of a fair share of local taxes for property of the United States so situated. In doing so, the Congress need only follow the precedent which it has set in the low-cost, slum clearance, and defense housing legislation, which
162a provides for the payment of an equitable share of the local taxes on such housing.

The appeal will be sustained and the assessment of the machinery owned by the United States of America will be set aside.

Order

And now, to wit, this 18th day of January, A. D. 1943, after the taking of testimony and the hearing of arguments, and upon consideration thereof, the appeal in the above entitled case is sustained, the assessment of the machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the machinery of the Mesta Machine Company is reduced from $2,489,085.00 to $1,871,085.

The County of Allegheny is ordered to pay the costs of this proceeding.

By the Court,

ELL.

Ex die, exception noted to the Board of Property Assessment, Appeals and Review of Allegheny County, and bill sealed.

[SEAL] HENRY ELLENBOGEN, *Judge*.

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163 In the Supreme Court of Pennsylvania, Western District

Docket Entries

No. 77 March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

APPEAL OF COUNTY OF ALLEGHENY

Appeal from the order of the Court of Common Pleas of Allegheny County at No. 1560 July Term 1942

January 29, 1943, Appeal and affidavit filed and writ exit.
February 5, 1943, Appearance for appellee filed.

March 17, 1943, Assignments filed.

March 18, 1943, Record and Testimony filed. F–6.

March 19, 1943, Appearance of Chas. F. Uhl, United States Attorney for the Western District of Pennsylvania, filed.

March 26, 1943, Argued. 101.

May 12, 1943, Decision.

The order is reversed, and the assessment of $3,901,504 made by the Board of Property Assessment, Appeals, and Review of Allegheny County of the mill of the Mesta Machine Company for the year 1942 is restored and affirmed; costs to be paid by the Mesta Machine Company. Drew, J. Mr. Justice Horace Stern and Mr. Justice Allen M. Stearne dissent; and Mr. Justice Horace Stern files a dissenting opinion, in which Mr. Justice Allen M. Stearne, concurs.

May 24, 1943, remitted.

May 27, 1943, Petition by Mesta Machine Co. and United States of America, intervening appellee, for supplemental certiorari, record to be held for thirty (30) days, during which period petitioners may file petition for reargument or for allowance of appeal to Supreme Court of United States, or both, filed.

ORDER

And now, to wit, this 4th day of June 1943, the foregoing petition having been presented, it is, upon consideration thereof

Ordered that a Supplemental Writ of Certiorari issue in
164 this case, directed to the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to the Prothonotary of this Court, at Pittsburgh; and it is further:

Ordered that when so returned by the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, the record aforesaid shall be held by the Prothonotary of this Court, for a period of thirty (30) days and that within said period of thirty (30) days the petitioners, United States of America and Mesta Machine Company or either of them, shall have the right to file their petition or petitions for reargument of this case, or for the allowance of an appeal or appeals to the Supreme Court of the United States, or both.

Per Curiam.

D.

June 5, 1943, Writ exit.

June 18, 1943, Petition by Mesta Machine Co., appellee, for extension until July 24, 1943, of order, to hold record for appeal to Supreme Court of United States, filed.

ORDER

June 28, 1943, the within petition is granted; the record will be held until July 24, 1943. G. W. Maxey, C. J.

July 21, 1943, Motion for reargument and acceptance of service of filing of motion, filed.

ORDER

Aug. 12, 1943, Petition for reargument refused. Per Curiam.

ORDER

And now, August 16, 1943, it is ordered that the Prothonotary of this Court shall hold the record in this case for the period of ninety days, during which time the Petitioners, Mesta Machine Company and the United States of America, or either of them shall have the right to file their petition or petitions for the allowance of an appeal to the Supreme Court of the United States as provided by law. Geo. W. Maxey, Chief Justice.

165 September 9, 1943, Petition for appeal to the Supreme Court of the United States; Assignment of Errors; Statement of Jurisdiction; Acceptance of Service, filed.

ORDER ALLOWING APPEAL

The appellants in the above-entitled suit, Mesta Machine Company, and the United States of America, Intervenor, and both of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania on the 12th day of May 1943, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Pennsylvania, shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within

thirty days of this date. Dated September 15, 1943. George W. Maxey, Chief Justice of the Supreme Court of Pennsylvania.

September 17, 1943, Praecipe for certification of the transcript of record to Supreme Court of the United States filed.

September 18, 1943, Citation with acceptance of service by Walter P. Smart, County Solicitor of Allegheny County and Harry M. Montgomery, Assistant County Solicitor of Allegheny County dated September 18, 1943, filed.

September 18, 1943, Acceptance of service by Walter P. Smart, County Solicitor of Allegheny County of copy of petition for allowance of appeal to Supreme Court of the United States, together with copy of assignment of errors and statement of
166 *of* jurisdiction filed.

September 18, 1943, Statement of points relied on lodged.

September 29, 1943, Bond of Mesta Machine Company with American Surety Company as surety in the sum of $250.00 conditioned for the payment of costs and with the following order of approval attached, filed.

ORDER OF COURT

And now, September 29, 1943, the foregoing bond is approved. George W. Maxey, Chief Justice of the Supreme Court of Pennsylvania.

October 1, 1943, Appellee's Statement addressed to the Supreme Court of the United States opposing Jurisdiction and Motion to Dismiss or Affirm; and Acceptance of service, filed.

October 1, 1943, Stipulation designating the parts of the Record to be included in the Transcript on Appeal to the Supreme Court of the United States, filed.

October 5, 1943, Original citation with acceptance of service endorsed, authenticated transcript of record and statement of points relied upon delivered to Honorable Elder W. Marshall, of counsel for appellants, for transmission to the Supreme Court of the United States.

For Appellant: Walter P. Smart, Harry M. Montgomery.

For Appellee: Elder W. Marshall, Carl E. Glock, Reed, Smith, Shaw & McClay, Attys. for Mesta Machine Co. Samuel O. Clark, Jr., Sewall Key, Paul F. Mickey, Attys. for United States of America; Chas. F. Uhl, United States Atty. for the West. Dist. of Penna.

167 In Supreme Court of Pennsylvania

Assignments of Error

1. The lower Court erred in entering the following Order, which Order and the exception thereto are as follows:

"ORDER

"And now, to wit, this 19th day of October A. D. 1942, the rule to show cause heretofore granted is made absolute and the United States of America is hereby allowed to intervene in the appeal pending at the above-mentioned number and term.

"By the Court,

"ELL.

"Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

"[SEAL] HENRY ELLENBOGEN, *Judge*."

(R. p. 24a.)

2. The lower Court erred in overruling the Board's objec-

168 tion to the following offer of testimony, which offer, the objection thereto, the ruling thereon and the exception thereto are as follows:

"Mr. MICKEY. Paragraph four: 'On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto, which are true and correct except that there have been deleted therefrom certain figures not material to the present controversy that in the public interest should not be disclosed, are attached to and made a part of the Intervening Petition of the United States filed herein. Said copy of the contract and the amendment thereto are made a part hereof by reference.'

"Mr. MONTGOMERY. Objection is entered to that as being incompetent, irrelevant and immaterial. The County does not deny, however, that there is such a contract in existence.

"Mr. MICKEY. Your objection is that the statement is immaterial, not that it is incompetent. You agree that such a contract was entered into and that the copy of the contract as attached to the intervening petition of the United States which has been filed herein is a true and correct copy of the contract with the exceptions stated in this paragraph?

"Mr. MONTGOMERY. Agree to that extent; yes, sir.

169 "Objection overruled.

"Exception noted."

(R. pp. 43a–44a.)

3. The lower Court erred in overruling the Board's objection to the following offer of testimony, which offer, the objection thereto, the ruling thereon and the exception thereto are as follows:

"Mr. MICKEY. Paragraph five: 'Mesta Machine Company erected a building, #30, which is otherwise known as the Ordnance Building, on land owned by Mesta Machine Company, which was to be and was equipped with machinery and machine tools as set forth in Schedules A, B, and C of said contract and in the list attached to the petition of Mesta Machine Company filed herein, and in the document offered in evidence herein and marked as "County's Exhibit C," all of which machinery and machine tools were furnished by the United States, as provided in the contract and as hereinafter set forth.'

"Mr. MONTGOMERY. Down to the portion where it commences, 'all of which machinery and machine tools were furnished by the United States,' is admitted, but the balance of the paragraph is not admitted at this time.

"Mr. MICKEY. Perhaps it would not be objectionable to counsel for the County if we stated it this way: 'All of which machinery and machine tools were acquired and installed in said building under the provisions of said contract and as hereinafter set forth.'

"Does the County object to that statement?

170 "Mr. MONTGOMERY. No; I will not object to that statement.

"Mr. MONTGOMERY. I would like to enter an objection to the materiality of paragraph five just read, although I will agree to the truth of the statement as read.

"The COURT. Objection overruled. You may proceed.

"Exception noted."

(R. pp. 44a–45a.)

4. The lower Court erred in entering the following Order, which Order and the exception thereto are as follows:

"ORDER

"And now, to wit, this 18th day of January A. D. 1943, after the taking of testimony and the hearing of arguments, and upon consideration thereof, the appeal in the above entitled case is sustained, the assessment of the machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the machinery of the Mesta Machine Company is reduced from $2,489,085.00 to $1,871,085.

"The County of Allegheny is ordered to pay the costs of this proceeding.

"By the Court,

"ELL.

"Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

"[SEAL] HENRY ELLENBOGEN, *Judge*."

(R. p. 162a.)

171 In the Supreme Court of Pennsylvania, Western District

No. 77 March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

APPEAL OF COUNTY OF ALLEGHENY

Appeal from the Order of the Court of Common Pleas of Allegheny County at No. 1560 July Term 1942

Opinion of the Court

Filed May 12, 1943

DREW, J.

This is an appeal from an order of the Court of Common Pleas of Allegheny County reducing a final assessment on the real estate of the Mesta Machine Company, a private corporation located in the Borough of West Homestead, Allegheny County, Pennsylvania, made by the Board of Property Assessment, Appeals and Review for ad valorem taxes, pursuant to the Act of May 22, 1933,[1] P. L. 853, Art. II, sec. 201, as amended by the Act of July 2, 1941, P. L. 219, sec. 1.[2]

172 At the triennial assessment for the years 1940, 1941, and 1942, the taxable value of the mill of the Mesta Company, consisting of lands, as well as buildings and machinery located

[1] The provision contained in sec. 12 of the Act of June 21, 1939, P. L. 626, that "The action of the court (below) shall be final," does not apply to assessments made prior to those for the triennial period beginning 1943.

[2] This section of the statute provides: "The following subjects and property shall, as hereinafter provided, be valued and assessed and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate: (a) All real estate to wit: Houses, lands, lots of ground and ground rents, *mills* and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation." [Italics added.]

therein, was valued and assessed for real estate tax purposes. In February 1942, the Board increased the assessments, inter alia, by the sum of $618,000, to cover the value of certain additional machinery which had been installed on the premises as an integral part of the mill. This machinery was placed in the mill of the Mesta Company, which was the record owner of the land upon which its mill was located, not on a temporary basis, but instead to enable that company to carry out the very purpose for which it was organized, i. e., the manufacture of heavy equipment for profit. This revised assessment was sustained by the Board; and the Mesta Company, contending that it was not liable for the tax based on the additional assessment for the reason that the company did not own that machinery but merely leased it from the United States government which held title thereto, appealed to the Court of Common Pleas. That tribunal permitted the Federal government to intervene in the proceeding, over the objection of the County. After hearing, the court below entered an order sustaining the appeal, setting aside the assessment as to that machinery and reducing the assessment of the mill of the Mesta Company by the sum of $618,000. From that order, the County of Allegheny has appealed to this Court.

This is a case of great importance because our decision will not only dispose of the present controversy, but will also affect many similar arrangements which have been or will be entered into by the United States government with various individuals and companies throughout this Commonwealth as a result of the present national emergency.

The principal contention of Allegheny County is that there is no competent evidence to support the action of the court below in reducing the assessment here under consideration. The County presented a prima facie case by the production of the record
173 of assessment, made by proper officers and approved by the Board of Property Assessment, Appeals and Review: Chatfield v. Board of Rev. of Taxes, 346 Pa. 159; Westbury Apartments, Inc., Appeal 314 Pa. 130. The Mesta Company and the intervenor, the Federal government, to meet the burden thus cast on the company, offered in evidence a contract entered into between them on October 30, 1940, whereby the company, on a cost-plus-and-fixed-fee basis, undertook to manufacture heavy field guns for the government. This agreement specifically set forth, among other things, that the machinery, the assessment of which gave rise to this appeal, was the property of the Federal government which leased it to the Mesta Company for an indeterminate period, at the nominal rental of one dollar; that the machinery was to be installed on the land and in a building owned by the

Mesta Company for the latter's use in manufacturing for profit the war matériel contracted for; and that upon the termination of the contract the Mesta Company was to remove the machinery and ship the same, at the expense of the government, to a point to be designated by a representative of the War Department. This agreement was admitted in evidence over the objection of the County, which argues that the court below thereby committed error.

There can be no doubt that the machinery here under consideration formed a real and permanent part of the mill of the Mesta Company, and was, therefore, a proper subject of assessment as real estate, under the provisions of section 201 of the Act of May 22, 1933, P. L. 853, as amended. In Patterson v. Delaware County, 70 Pa. 381, it was held that the land and building, as well as the machinery, which constituted a cotton factory, were taxable as real estate, under the 32d section of the Act of April 29, 1844, P. L. 486 (the provisions of which are practically identical with those of section 201 of the Act of 1933, as amended). There the court below said, and its views were affirmed by this Court in a per curiam opinion (p. 383):

174 "That the property taxed in the case before us is real estate is not, of course, doubted. But the plaintiff thinks this particular kind of real estate was not intended to be taxed. He argues that the enumeration of certain kinds in the act, as 'houses, lands, lots of ground, ground-rents, mills,' etc., was to designate precisely what the legislature intended by the preceding terms 'all real estate,' and that everything not embraced in this enumeration is excluded. But this view seems to overlook the very important language, before referred to, which follows the enumeration: 'all other real estate.' * * * Does not the property here taxed fall within the enumeration? The machinery in a mill is as much a part of it as are the walls * * * The plaintiff admits this; but says the legislature did not use the term 'mill' in this sense; that while such is the legal signification of the term, the popular meaning is otherwise; and that the legislature must be regarded as adopting the latter. But is the popular meaning otherwise? When a man, of common intelligence and business experience, speaks of 'Mr. Patterson's Mill,' what does he mean? The establishment in its completed condition—fitted for its proper use? Or the bare walls? (For there is no intermediate point; all between, from the engines to the spindles, is machinery.) He could hardly mean the latter; for the walls do not constitute a mill, and bear no more resemblance to it, than to a barn."

Furthermore, this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes. In this connection, it was said in Bemis v. Shipe, 26 Pa. Superior Ct. 42, 45: "It may be admitted
175 that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no means follows that in contemplation of law for other purposes it is not real estate. Without the express permission of the owners of the land to remove the buildings prior to a certain date, if nothing whatever had been said in regard to them in the original lease, they would doubtless belong to the owners of the land at the expiration of the lease, as being part of the real estate, but such permission does not change the physical character of the property, nor does it in any way change its legal status, except as between the parties themselves and those claiming under them and as to the legal machinery through which the title of the lessees may be transferred to creditors or others who desire to secure their rights." See also Pennsylvania Stave Company's Appeal, 236 Pa. 97; Guthrie v. Pittsburg Dry Goods Co., 47 Pa. Superior Ct. 384.

Nor can the Mesta Company, by its private arrangement acknowledging that the Federal government has title to the machinery which is an integral part of the mill of the company, evade the right of the County to assess the company as the owner of the mill erected upon land title to which is in its name upon the public records. The mill of the company was taxable under the statute as real estate, and this necessarily included the machinery essential to the existence and operation of that manufactory. In Guthrie v. Pittsburg Dry Goods Co., supra, the Superior Court held that the owner of the land and building cannot deny his liability for a portion of the tax because the machinery which composed a permanent and essential part of the manufactory was owned by a tenant who had the right to remove it at the end of his lease. There it was said (p. 401): "Does the private arrangement between the tenant and the landlord which permitted the former to remove the machinery at the end of the term change
the character of the property as affected by the taxing
176 statutes? We think not * * * If the machinery is not to be included there is no manufactory to be taxed and the land and building would be liable not as a factory but as 'other

real estate' as provided in the same section of the statute. The property is either a manufactory or it is not. If a manufactory it is clearly subject to taxation under the specification of that class of property."

The record showed that title to the land was in the Mesta Company, and the assessor was not obliged to go further. Under the circumstances, he was justified in treating the ground, building, and machinery as an entity, a mill, or manufactory, and assessing it as such to the Mesta Company, the registered owner of the land. In Pennsylvania Co. v. Bergson, 307 Pa. 44, 51, this Court said: "When a deed or other conveyance is duly recorded and registered in the name of a given person he, as the registered title holder, is regarded as the 'owner' for purposes of assessment and taxation, and is personally liable for taxes levied on the property. This liability attaches because he holds himself out to the world through public records as owner by being registered and recorded as owner * * * These authorities may, for the purpose of taxation, treat individuals in their several relations as they appear on the designated indices or the public records that are provided." See also Germantown Tr. Co. v. Stanley Co., 338 Pa. 533; Starling v. W. Erie Ave. B. & L. Assn., 333 Pa. 124; N. Phila. Tr. Co. v. Heinel Bros., Inc., 315 Pa. 385. This is true whether or not the registered owner is in fact the actual owner (Trust Co. v. Bank and Tr. Co., 326 Pa. 262); though the actual owner who is not the record owner may also be assessed, if, of course, not exempt for some reason from taxation (Pennsylvania Stave Company's Appeal, supra; Bemis v. Shipe, supra; County of Franklin v. McClean, 93 Pa. Superior Ct. 165). The application of this principle does not constitute a violation of due process within the meaning of the Fourteenth Amendment of the Federal
177 Constitution: Fid.-Phila. Tr. Co. v. Bergson (No. 1), 328 Pa. 545.

It is well established that property held by the United States for the purposes conferred on the government by the Constitution and laws of the United States is beyond the pale of taxation by a State or its political subdivisions (Irwin v. Wright, 258 U. S. 219; City of Phila. v. Harry E. Myers, 102 Pa. Superior Ct. 424), unless, of course, permitted by congressional consent.[3] In holding that real estate owned by the United States government was immune from taxation by the State of Tennessee, the United States Supreme Court, in Van Brocklin v. State of Tennessee, 117

[3] As an example of this, consent to tax the real estate of certain Federal agencies was given in the Act of Congress of January 22, 1932, ch. 8, § 10 (15 U. S. C. § 610), as amended, which provides: "* * * any real property of the corporation (the Reconstruction Finance Corporation and other corporations created under its authority, such as the Defense Plant Corporation, etc.) shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

U. S. 151, 155, said: "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." See also Penn Dairies, Inc. v. Milk Control Commission, — U. S. — (decided March 1, 1943); Clallam County v. United States, 263 U. S. 341; Mint Realty Company v. Philadelphia, 218 Pa. 104. But this sound and well-settled principle of constitutional law is not in any way applicable to the instant circumstances, for the tax on the mill, which necessarily
178 includes the machinery which forms a component part of the manufactory, is not assessed against the government, but rather against its independent contractor, the Mesta Company, which is operating the mill in furtherance of its own business, on land to which it holds the record title. To exempt this machinery from taxation would not be in relief of the government, but rather in relief of the Mesta Company, and, therefore, it is clear that the machinery is the proper subject of assessment for tax purposes as the property of the Mesta Company even though legal title to it is actually in the Federal government. The fact that the latter, by Article I–D [4] of its contract with the company, voluntarily agreed to pay the tax has no bearing whatsoever upon this decision, for the legal obligation to pay was on the company and not on the government: Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14; Penn Dairies Inc. v. Milk Control Commission, supra. If the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected. Cf. New Brunswick v. United States, 276 U. S. 547; City of Phila. v. Harry E. Myers, supra. Thus, the government's status, as far as the machinery is concerned, is precisely the same throughout, and it cannot suffer any loss by reason of the assessment of its machinery as part of the Mesta mill. For these reasons, if for no other, the tax on the mill must be held to be legal and just.

[4] "ARTICLE I–D: 1. The Contractor shall be reimbursed in the manner hereinafter described for * * * (g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

In upholding the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as it affected a dealer selling milk to the government to be disposed of on lands belonging to this Commonwealth but in use by the Federal government as a military encampment, Mr. Chief Justice Stone, in speaking for the United States Supreme Court, in Penn Dairies, Inc. v. Milk Control Commission, supra, said (p. —): "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy * * *" It is a matter of great seriousness to the states and their municipal subdivisions that individuals and corporations pay their fair share in taxes for the benefits they and their personnel undoubtedly receive from the public services they enjoy, such as police and fire protection, the use of streets and schools, and other advantages of community life. These are adjuncts of civilization, necessary but expensive, and those who have them should and must pay for them.

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Moreover, the fact that one of the two possible parties liable for a tax—the record owner or the actual owner—may for some reason be exempt from taxation will not defeat the right of the taxing power to enforce payment by the order. In County of Franklin v. McClean, supra, the County levied a tax against buildings erected upon lands leased by the Commonwealth to a tenant who owned the buildings and under his lease had the right to remove the same at the expiration of his term. The record owner being the sovereign, which is not subject to taxation by its subdivisions, the tax upon the structures was assessed in the name of the tenant, the real owner thereof, and this was held proper by the Superior Court. There it was said (p. 171): "We regard the fact that appellant's estate is held under the State as lessee, rather than under an individual, as immaterial. The tax is not laid against the State nor its interest in the land." In Kittanning Academy v. Kittanning Boro., 8 Pa. Superior Ct. 27, it was held that a dwelling-house and property leased by a corporation for school purposes for a term of years at an annual money rental and an agreement to pay taxes and keep the property in repair does not work an exemption from taxes assessed against the owner of the real estate.

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The County of Allegheny further contends that the court below also erred in permitting the Federal government to intervene in the appeal filed in the court below by the Mesta Company against

whom the assessment was made. We need not pass upon this question, for obviously under our disposition of the controversy the County in no way was harmed by such intervention.

We are satisfied that the evidence that the machinery was not owned by the Mesta Company was irrelevant and, therefore, improperly admitted. Since the record contains no competent evidence to warrant the action of the court below, the order must be reversed and the assessment of the Board reinstated.

The order is reversed, and the assessment of $3,901,504 made by the Board of Property Assessment, Appeals and Review of Allegheny County of the mill of the Mesta Machine Company for the year 1942 is restored and affirmed; costs to be paid by the Mesta Machine Company.

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Mr. Justice HORACE STERN and Mr. Justice ALLEN M. STEARNE dissent; and Mr. Justice HORACE STERN files a dissenting opinion, in which Mr. Justice ALLEN M. STEARNE concurs.

181 In the Supreme Court of Pennsylvania, Western District

No. 77, March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY, ETC.

APPEAL OF COUNTY OF ALLEGHENY

Appeal from Order of Court of Common Pleas of Allegheny County, July Term, 1942, No. 1560.

Dissenting opinion

Filed May 12, 1943

HORACE STERN, J.

In dissenting from the court's decision I start with the observation that never since the foundation of our government, so far as careful research has disclosed, has there been a case, either in a state or a federal court, in which a tax imposed by a state or other local authority on property belonging to the United States was sustained, except where the consent of Congress to such taxation had been given, or where the United States had the legal title to the property but the equitable or beneficial interest was in private ownership. Nor has any difference ever been suggested in the application of this principle between personal property, real estate, and chattels affixed to the land and therefore regarded for

some legal purposes as real property. On the contrary, every reported case has recognized the immunity from local taxation of all property actually owned by the United States. The leading decision to that effect, Van Brocklin v. State of Tennessee, 117 U. S. 151, far from being subsequently questioned or departed from, has been cited with approval and followed in a number of cases continuing in unbroken sequence to the present day; for
182 example: Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496 (where it was said: p. 504: "It is familiar law that a State has no power to tax the property of the United States within its limits"); Clallam County v. United States, 263 U. S. 341 (which extended such immunity to property of a corporation all the stock of which was owned or controlled by the United States, the corporation being an instrumentality organized for the purpose of carrying on the first world war); Lee v. Osceola & Little River Road Improvement District, 268 U. S. 643 (where it was said, p. 645: "It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. * * * This is conceded"); Fox Film Corporation v. Doyal, 286 U. S. 123 (where it was said, p. 128: "The property of the United States is not subject to state taxation"). It is true that where land belonging to the government is sold to a purchaser and the latter has complied with all the requirements of the contract, so that nothing remains to be done but the issuance of a patent or the execution of a deed, the property is subject to state taxation, because in that event equitable ownership has passed to the vendee and the government has a mere naked title; however, if any antecedent condition remains unperformed the property, as such, is exempt from local taxation: Railway Co. v. Prescott, 83 U. S. 603; Railway Co. v. McShane, 89 U. S. 444; Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600; Wisconsin R. R. Co. v. Price County, 133 U. S. 496; United States v. Rickert, 188 U. S. 432; Irwin v. Wright, 258 U. S. 219; Jaybird Mining Co. v. Weir, 271 U. S. 609; United States v. City of Milwaukee, 100 Fed. 828; Lincoln County v. Pacific Spruce Corporation, 26 Fed. (2d) 435; Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 A. 1130; see also City of New Brunswick v. United States, 276 U. S. 547.

183 From a study of these authorities it will be observed that they hold that taxation of government property is prohibited when the tax is assessed, not merely against the United States, but against private individuals or corporations as well, and irrespective of who may have the use or possession of it; in most of those cases the United States was not even a party. The majority opinion cites authorities which it asserts support the proposition that where the tax is not assessed against the govern-

ment but against an independent contractor the immunity do
not exist. This, it seems to me, is a misconception of the import
those decisions. What they hold is that a state has the right
impose a tax on an independent contractor on property owne
not by the United States, but by the contractor; in other wor
the right of a state to tax the property of a citizen is not impair
merely because of the existence of a contract between that citiz
and the United States as the result of which the tax indirectly i
poses an economic burden on the government. As examples
such cases—obviously not to be confused with one such as t
present where the tax is imposed not upon the property of the co
tractor but upon that of the United States—may be cited: Thoms
v. Pacific Railroad, 76 U. S. 579; Railroad Company v. Peniste
85 U. S. 5; Baltimore Shipbuilding & Dry Dock Co. v. Baltimo
195 U. S. 375; Susquehanna Power Co. v. State Tax Commissi
of Maryland, 283 U. S. 291; Taber v. Indian Territory Illuminati
Oil Co., 300 U. S. 1; James v. Dravo Contracting Co., 302 U. S. 1
(where it was said, p. 149: "The tax is not laid upon the gover
ment, its property or officers," nor "upon an instrumentality
the government"); Alabama v. King & Boozer, 314 U. S. 1 (whe
there was a tax on the purchase of building materials by a contra
tor but where impliedly it was held that if the government h
been the purchaser the tax would have been invalid); Cur
184 v. United States, 314 U. S. 14 (where a use-tax was impos
on material of contractors employed by them in the pe
formance of their government contract).

In the present case it must be borne in mind that before, at, a
ever since the time of the imposition of the tax, not only the leg
title but the entire beneficial ownership of the machinery w
solely in the United States; it was merely loaned or leased to t
Mesta Company for the nominal consideration of a dollar. Mor
over, it is not pretended that the tax was based on an apprais
valuation of any interest of the Mesta Company in the machine
arising from its right to use it; the assessment was on its fu
value, appraised as a separate item of property at $618,000, a
was a direct tax on the property itself. As a matter of fact, t
contract between the Mesta Company and the government pr
vided that the company could not use this machinery for a
purpose other than the manufacture of guns for the United Stat
under that contract, so that the company had no interest of i
own in the machinery in connection with any private manufa
turing business it might transact. The law of Pennsylvania do
not permit an assessment against divided equitable interests in re
estate but assesses the entire taxable res as such, and if a tax sa
results from default in the payment of the tax, the title to t

res is sold: Mint Realty Co. v. Philadelphia, 218 Pa. 104, 112, 66 A. 1130, 1132.

In People ex rel. Donner-Union Coke Corporation v. Burke, 204 App. Div. 557, 198 N. Y. S. 601, it was held that a plant (buildings and equipment) owned by the federal government, which was erected during the first world war on land owned by a private corporation and sold to that corporation under a contract reserving title until payment of all installments due, was not subject to taxation by the City of Buffalo. That decision was affirmed
185 by the New York Court of Appeals, without an opinion, in 236 N. Y. 650, 142 N. E. 320. The legislature of New York then passed an act authorizing the assessment and taxation of the interest of the private corporation in the property, such assessment to be at the full value of the property, but it was held that this was nothing more than an attempt, under the guise of taxing the corporation's interest, to tax the property itself, and accordingly, while the assessment of the land belonging to the corporation was sustained, the assessment of the plant built thereon and owned by the United States was vacated and set aside: People ex rel. Donner-Hanna Coke Corporation v. Burke, 217 N. Y. S. 803, affirmed, without an opinion, in 222 App. Div. 790, 226 N. Y. S. 882, and by the Court of Appeals in 248 N. Y. 507, 162 N. E. 503.

In Andrews, Ordway & Green v. The Auditor, 69 Va. (28 Grat.) 115, it was held that buildings which were the property of the United States, erected on land belonging to a private owner and used for dressing stone to be employed in the erection of public buildings at Washington, were not subject to taxation by the State of Virginia either as personal property or as parcel of the land on which the buildings were erected. The court said in language which is here peculiarly apposite: (p. 128: "Undoubtedly where the buildings erected on the land are themselves the subject of taxation, the state will take no notice of private contracts which sever the ownership of the land from that of the buildings, and will hold the owner of the land responsible for the taxes on both. But suppose the buildings are exempt from taxation—how then? Suppose a church or parsonage, or other building used for charitable purposes, is erected on land with the permission of the owner, he retaining the title to the soil on which it stands; can the owner of the land be taxed for the value of
186 such buildings? Certainly not. If authority is wanting for so self-evident a proposition, I refer to the cases cited by the learned counsel for the defendants in error * * *. But it is said that churches and like buildings are exempt from taxation by express statute. So they are. And the buildings erected

by the United States, owned by that government, and used for the lawful purpose of carrying into execution its granted powers, are also exempt from taxation—not by express statute it is true, but by laws as potent and obligatory as if they were written on the statute books of every state in the Union."

In our own state, in County of Franklin v. McClean, 93 Pa. Superior Ct. 165, a private citizen constructed improvements on land leased from the Commonwealth, and it was held that the buildings thus erected were taxable by the county as real estate but the land itself, belonging to the Commonwealth, was not taxable. By the same token the reverse is true; that is to say, if the land were privately owned and the title to the improvements were in the Commonwealth the improvements would be exempt from taxation although the land would be taxable to its owner.

Not only because this machinery is owned by the United States is it exempt from taxation, but also because it is an instrumentality of the United States used in the prosecution of the war and therefore in the exercise of the most vital power conferred by the Constitution upon the federal government. The Mesta Company is an independent contractor and not itself an instrumentality of the government (Penn Dairies v. Milk Control Commission of Pennsylvania, 63 Sup. Ct. Rep. 617, 620) but property can be, and the machinery here is, such an instrumentality: United States v. Rickert, 188 U. S. 432; Port Angeles Western R. R. Co. v. Clallam County, 20 Fed. (2d) 202; Dewey County v. United States, 26 Fed. (2d) 434 (certiorari denied 278 U. S. 649).

187 Indeed, it seems to me inconceivable that a state or other local authority should have the power to impede the national effort to win the war by imposing taxes upon the instruments owned and needed by the government for that purpose. If the United States had guns stored in various cities of the Union, could such cities, or the states in which they were located, impose a property tax upon those implements of warfare? I realize that there has been a trend in the decisions of the Supreme Court of the United States toward holding that non-discriminatory taxation by a state, that is to say, taxation which does not single out the United States as a taxpayer, is not invalid; that trend is discussed in Penn Dairies v. Milk Control Commission of Pennsylvania, 63 Sup. Ct. Rep. 617, 621. But, while a tax discriminating against the United States would certainly be invalid, I do not understand that a tax is valid just because it does not so discriminate; its validity is still subject to the limitation which, resulting from the nature of our federal system, requires that property belonging to the United States, and especially if used by it for the performance of one of its vital constitutional functions, should be exempt from local taxation. If, for example, a property tax

were imposed by a state on all courthouse buildings within the state, could the tax be levied on a federal courthouse there located just because it applied to all courthouses, state and federal alike? If a property tax were imposed by a state on guns carried by persons within the state, could the tax be levied, because it was nondiscriminatory, on guns carried by soldiers of the United States army within that state? The doctrine of "non-discriminatory" taxation has been applied to taxes on the property of contractors dealing with the government, but it has never been held to justify a tax imposed upon the government's own property or upon the instrumentalities through which it exercises the powers
188 granted it by the Constitution. Nor is there any merit in the argument that the machinery, together with all the other property in the mill, is presumably given local police and fire protection. Such protection is also afforded to federal post-offices, courthouses, arsenals and other government establishments, but that does not make them liable to local taxation; it is for Congress alone to declare that, because of this consideration, the state or other local authority should be permitted to tax government property.

The basic theme of the majority opinion is that, although this machinery belongs to the United States, it lost its immunity from state taxation when the government allowed it to be placed in the plant of the Mesta Company; in that connection great stress is laid upon the decisions in Pennsylvania which hold that the tax here imposed is one on the mill or manufactory as a whole, and that tax assessors are not required to investigate whether any part of the equipment belongs to someone other than the apparent owner. It need scarcely be said that the inconvenience which might be occasioned to tax assessors arising from any such duty of investigation (Pennsylvania Company, Trustee, v. Bergson, 307 Pa. 44, 51, 159 A. 32, 34) is not to be weighed against the right of an exempt owner. As far as private persons are concerned, Pennsylvania may, if it sees fit—either as a matter of practical expediency or of economic policy—tax land, building, and equipment as a whole, regardless of the fact that parts of the property may be owned by other persons, and even by citizens of other states: Coe v. Errol, 116 U. S. 517. In the present case, however, we are dealing, not with expediency or policy, but with the constitutional power of Pennsylvania where the owner of part of the property taxed happens to be the United States. It is contended that, although machinery belonging to the government is
189 not taxable so long as it retains its status as personal property, it becomes locally taxable as real property when bolts are driven through it to the floor of the Mesta Company's mill. It

is true, of course, that for certain purposes machinery affixed to a building is regarded by the law as though it were real estate, and, if privately owned, might properly be so regarded for purposes of taxation. Even if, however, it be deemed to be real property, it is real property belonging to the United States and therefore is not taxable. If the United States owned a horizontal islet of land in the middle of the plant, certainly no one would contend that that islet would be taxable; it may not be too fanciful to view this machinery as a piece of vertical real property belonging to the United States, and no more taxable, therefore, than it would be under the hypothesis suggested, for what difference should it make whether the property owned by the government be distinguished from that owned by the Mesta Company by horizontal or by vertical boundary lines? Such a distinction would subordinate actualities to a type of legalism unbefitting the purpose and art of constitutional interpretation. The important point is that, whatever the technical nomenclature ascribed to it, the machinery is owned by, and is an essential instrumentality of, the United States, and it cannot be deprived of the resulting immunity given it under our constitutional system merely because, in order to facilitate its operation, it is necessary temporarily to fasten it to the floor of a mill. Such fastening still leaves it a distinct, individuated part of the property; it does not change its ownership, and it is ownership which is the criterion of taxability under the statute by which this tax is imposed. In short—to state the basic proposition in simple language—the United States owns a distinct, clearly defined, tangible part of this mill and that part is exempt from local taxation.

190 It is said in the majority opinion that "if the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected." It seems to me that this very statement constitutes a back-handed acknowledgment of the weakness of the majority viewpoint. The Act of June 4, 1901, P. L. 364, provides that all taxes are first liens on the property taxed and that such liens shall be first paid out of the proceeds of any judicial sale of the property. In the admission, therefore, that this machinery cannot be sold by the taxing authority there is inherent the admission that it cannot be taxed, for, as was said in Mint Realty Company v. Philadelphia, 218 Pa. 104, 110, 66 A. 1130, 1132, "The power to tax implies the power to divest the title by a tax sale when there is default in the payment of the taxes levied," and in Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600, 610; "A valid sale * * * for taxes, being the highest exercise of sovereign power of the State, must carry the title to the

property sold, and if it does not do this, it is because the assessment is void. It follows that, if the assessment of these taxes is valid * * *, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." As already stated, there is no pretense that the tax here in question was on the interest, equitable or otherwise, of the Mesta Company in the machinery, not only because the company had no such interest apart from its right to use the machinery under its government contract, but because the tax admittedly was on the full value of the machinery and was imposed upon the Mesta Company, not as user or possessor, but as owner of the mill. The situation, therefore, is quite different from that
191 which existed in the case of City of New Brunswick v. United States, 276 U. S. 547, where the vendees of property, the title to which was in the United States, not only had a substantial interest therein, but had completed the payments to the government which entitled them to receive a deed to the property and had thereby relegated the United States to the legal position of a quasimortgagee.

I take it that little, if anything, need be said in justification of the action of the court below in permitting the United States to intervene, for how else could it assert its rights? It is interested not only because it expressly contracted to reimburse the Mesta Company for the taxes which the latter might be required to pay, but because, even in the absence of such a contract, the Mesta Company could recover from it the amount of the tax on the machinery. "As between the real owner and the registered (that is, the nominal or apparent) owner, the latter is secondarily liable and may therefore recover from the real owner sums by him paid on account of the tax": Fidelity-Philadelphia Trust Company, Trustee, v. Land Title Bank & Trust Co., 326 Pa. 262, 264, 192 A. 121, 122. Thus there is peculiarly applicable here the statement made by the court in Colorado Bank v. Bedford, 310 U. S. 41, 52, that "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself." It is therefore clear that, just as in the Van Brocklin case and many others of those hereinbefore cited, the fact that the assessment of the tax is against the Mesta Company, and not the United States directly, is of no significance as far as the validity of the tax is concerned. The United States is the real party in interest, not because of any indirect shifting to it of the economic burden of the tax, but because it is bound, even irrespective of its contract, to reimburse the Mesta Company

192 and it is therefore the real taxpayer involved. Of course, the Mesta Company also has the right, apart from that of the government, to resist the tax imposed upon it; it is not obliged to submit to an invalid levy and then seek reimbursement from the government.

Because, then, the tax which is sought here to be imposed is on property legally and beneficially in the sole ownership of the United States, and because also it is property which is an instrumentality vital to the execution of the war powers of the government, I do not think it an exaggeration to say, as was said by the court below: "The taxing by a state or any of its sub-divisions of property owned by the United States of America and used by it in carrying out a constitutional function constitutes a violation of the Constitution of the United States and of the principle of dual sovereignty upon which that Constitution is based, is no longer open to debate. The assessment and levy of such a tax is clearly invalid."

I would affirm the order of the Court of Common Pleas of Allegheny County.

Mr. Justice ALLEN M. STEARNE concurs in this opinion.

193 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Petition for supplemental certiorari for additional time within which to file a petition for reargument, etc.

Filed May 27, 1943

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The petition of Mesta Machine Company, appellee, and United States of America, intervening appellee, respectfully represents:

First. In this proceeding, the County of Allegheny prosecuted its appeal to your Honorable Court, to secure a review of an order entered by the Court of Common Pleas of Allegheny County, Pennsylvania, holding invalid and setting aside the assessment for tax purposes of certain machinery owned by United States of America, which had been assessed as having a value of $618,000,00, and reducing an assessment for tax purposes of certain machinery assessed to Mesta Machine Company from $2,489,085.00 to $1,871,085.00.

Second. After this proceeding had been duly argued, your Honorable Court handed down its opinion and decision on May 12,

1943, reversing said order of the Court of Common Pleas of Allegheny County, Pennsylvania, and determining that
194 said assessments were valid and should be reinstated; and on May 24, 1943, the record of this case, including the opinion and order of your Honorable Court entered as aforesaid on May 12, 1943, was remitted to the Court of Common Pleas of Allegheny County, Pennsylvania.

Third. Your petitioners desire to present their petitions for reargument of this case before your Honorable Court, and it is essential that such petitions be presented in the event either or both of your petitioners, in the protection of their respective interests, should find it desirable to obtain a review of the decision of your Honorable Court by proceedings of appeal or certiorari in the Supreme Court of the United States. They are advised that such a petition for reargument should be made to your Honorable Court before any application is made for the allowance of an appeal or other procedure to secure review of this case by the Supreme Court of the United States.

Fourth. Your petitioners find it advisable to file a joint petition for reargument before your Honorable Court, but the preparation of such petition has proved difficult, and it has been impossible to complete the same at the present time, not only because of the breadth and difficulty of the questions of law involved, but also because counsel for the appellee, Mesta Machine Company, are attorneys at law practicing in Pittsburgh, Pennsylvania, while the attorneys for the appellee, United States of America, are attorneys in the Department of Justice, the offices of which are in the City of Washington, District of Columbia.

195 Fifth. Your petitioners are advised that under Rule 84 of Your Honorable Court, which reads in part as follows:

"Rule 84. Petitions for rearguments must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; * * *."

it is within the power and discretion of your Honorable Court, under such circumstances as exist in this case, to require that the record of this case be returned to your Honorable Court to permit the consideration of your petitioners' petition for reargument and their subsequent petition for the allowance of an appeal, if they should find it desirable to request such allowance, and also to grant to your petitioners such time as shall be reasonably necessary to prepare and file such petitions.

Wherefore, your petitioners respectfully pray that your Honorable Court make an order granting them a supplemental writ of certiorari, directed to the Prothonotary of the Court of Common

Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to your Honorable Court, and that your Honorable Court make an order requiring that when so returned, the record aforesaid shall be held by the Prothonotary of your Honorable Court for a period of thirty (30) days, and that during said period of thirty (30) days your petitioners shall have the right to file their petition for a reargument of this case, or for the allowance of an appeal to the Supreme Court of the United States, or both.

And your petitioners will ever pray, etc.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,
CHARLES F. UHL,
United States Attorney,
Attorneys for Petitioner,
United States of America.

ELDER W. MARSHALL,
JOHN C. BANE, JR.,
REED, SMITH, SHAW & MCCLAY,
Attorneys for Petitioner,
Mesta Machine Company.

196 [*Duly sworn to by John C. Bane, Jr.; jurat omitted in printing.*]

[File endorsement omitted.]

197 In Supreme Court of Pennsylvania

Order granting petition for supplemental certiorari, etc.

And now, to wit, this 4th day of June 1943, the foregoing petition having been presented, it is, upon consideration thereof—

Ordered that a Supplemental Writ of Certiorari issue in this case, directed to the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to the Prothonotary of this Court, at Pittsburgh; and it is further

Ordered that when so returned by the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, the record aforesaid shall be held by the Prothonotary of this Court for a period of thirty (30) days, and that within said period of thirty (30) days the petitioners, United States of America and Mesta Machine Company, or either of them, shall have the right to file their petition or petitions for reargument of this case, or for the allowance of an appeal or appeals to the Supreme Court of the United States, or both.

Per Curiam.

D.

198 Supreme Court of Pennsylvania, Western District

County of Allegheny

Supplemental certiorari

The Commonwealth of Pennsylvania

To the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain further proceedings in the Supreme Court in the matter of appeal of County of Allegheny from the judgment of your said Court, at No. 1560 July Term, A. D. 1942, In re Appeal of Mesta Machine Company from assessment by the Board of Property Assessment, Appeals, and Review of Allegheny County for the year 1942 of Property in West Homestead Borough, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought, as provided in section 18 of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable George W. Maxey, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 4th day of June in the year of our Lord one thousand nine hundred and forty-three.

PIER DANNALS, *Prothonotary.*

[SEAL OF SUPREME COURT OF PENNSYLVANIA]

198½ *To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:*

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

----------[L. S.]

----------[L. S.]

1560 July 1942. No. 77 of March Term, 1943. Supreme Court. In re: Appeal of Mesta Machine Company from assessment by the Board of Property Assessment, Appeals and Review of Allegheny County for the year 1942 of Property in West Homestead Borough. Appeal of County of Allegheny. Supplemental Certiorari to the Court of Common Pleas for the County of

Returnable forthwith. Rule on the Appellee to appear and plead on the return Day of the Writ. Prothonotary's Office, Filed June 4, 1943, D. Allegheny County, Pa. Filed June 5, 1943. Supreme Court. W. D.

199 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Petition for extension of time within which to file the petition for reargument or for allowance of an appeal to the Supreme Court of the United States.

Filed June 18, 1943

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The petition of Mesta Machine Company, appellee, and the United States, intervening appellee, respectfully represents:

1. On May 27, 1943, your petitioners filed a petition for supplemental certiorari in this cause, and for additional time within which to file a petition for reargument or a petition for allowance of an appeal to the Supreme Court of the United States, or both, alleging that the preparation of such petitions for reargument or for the allowance of an appeal, or both, has proved difficult on account of the complexity of the problems of law involved, and because counsel for your petitioners are located in different cities.

2. The petition filed on May 27, 1943, was granted, and an order was entered on June 4, 1943, directing that a supplemental writ of certiorari issue to the Prothonotary of the Court of Common Pleas of Allegheny County, requiring that the record herein be returned to the Prothonotary of this Court at Pittsburgh, and further directing that the Prothonotary of this Court should hold the record for a period of thirty days within which time your petitioners should have the right to file a petition, or peti-
200 tions, for rearguments of this cause, or for the allowance of an appeal, or appeals, to the Supreme Court of the United States, or both.

3. It now appears to your petitioners that the additional time requested was not adequate, and that an additional period of twenty days will be necessary for the preparation of such petitions as your petitioners may desire to file.

4. Your petitioners have requested counsel for the defendant herein to consent that your petitioners be granted an additional period of twenty days within which to file such petitions as may appear advisable, and counsel for the defendant have agreed to such extension.

Wherefore, your petitioners respectfully pray that your Honorable Court make an order requiring the record in this case to be held by the Prothonotary of your Honorable Court until July 24, 1943, and that until that date your petitioners shall have the right to file their petitions for a reargument of this case or for an allowance of an appeal to the Supreme Court of the United States, or both.

And your petitioners will ever pray, etc.

ELDER W. MARSHALL,
JOHN C. BANE, JR.,
REED, SMITH, SHAW & MCCLAY,
Attorneys for Mesta Machine Company.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.

Consent is hereby given that this petition be granted, and that an order be entered as prayed.

COUNTY OF ALLEGHENY,
By WALTER P. SMART,
County Solicitor.
HARRY M. MONTGOMERY,
Assistant County Solicitor.

201 [*Duly sworn to by John C. Bane, Jr.; jurat omitted in printing.*]

[File endorsement omitted.]

Order

June 28, 43

The within petition is granted; the record will be held until July 24, 1943.

G. W. MAXEY, *C. J.*

202 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Motion for reargument

Filed July 21, 1943

Your petitioners, Mesta Machine Company and the United States of America, appellees herein, respectfully pray this Honorable Court to grant a reargument in this cause, to reconsider the

conclusion reached in its opinion filed May 12, 1943, and to reverse that decision. Your petitioners desire a reargument upon the following points:

1. Whether the Act of May 22, 1933, P. L. 853, Art. II, Sec. 201, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, was intended to authorize the assessment of public property, the property of the United States of America.

2. Whether, if the statute does purport to authorize the assessment of property belonging to the United States of America, it would be valid under the Constitution of the United States merely because the assessment was made against Mesta Machine Company.

REASONS FOR MOTION AND ARGUMENT IN SUPPORT THEREOF

1. The first point is a question of statutory construction upon which this Honorable Court is the Court of last report, and, being without further recourse with respect thereto, your petitioners pray that they be granted the right of reargument. Your petitioners believe that the decision of this Court has overlooked and misapprehended important considerations bearing upon this point and that upon reargument and fuller consideration this Court would answer the question in the negative.

Prior to the decision in this case this Court, in considering
203 the intent and purpose of the statutes levying real property tax, has stated that the policy of the Pennsylvania law is to tax the real owner of real estate. Trust Co. v. Bank & Trust Co., 326 Pa. 262; Pennsylvania Co. v. Bergson, 307 Pa. 44. It has unequivocally stated that a person other than the actual owner who is called upon to pay the tax is, upon payment thereof, subrogated to the rights of the taxing body as against the real owner of the property. Fidelity Ins. Trust & S. Dep. Co. v. Phoenix Bldg. & Loan Assn., 17 Pa. Super. Ct. 270; Trust Co. v. Bank & Trust Co. and Pennsylvania Co. v. Bergson, both supra.

In its opinion filed on May 12, 1943, this Court recognized that "property held by the United States for the purposes conferred on the Government by the Constitution and laws of the United States is beyond the pale of taxation by a State or its political subdivisions, * * * unless, of course, permitted by congressional consent." Yet, at the same time, the Court said that "the machinery is the proper subject of an assessment for tax purposes as the property of the Mesta Company even though legal title to it is actually in the Federal Government."

Petitioners do not understand how the Pennsylvania Act can be construed as intending to impose a tax upon property of the Federal Government when the United States is admittedly the owner, the policy of the law is to tax the owner, and this Court

recognizes that the United States cannot be taxed. It is of no importance that the tax is collected by an assessment against Mesta Machine Company; the law itself subrogates Mesta Machine Company to the position of the taxing body for the purposes of collecting the tax. The effect is to impose a tax upon the United States. As was said in Colorado Bank v. Bedford, 310 U. S. 41, 52, "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

It is not contended that contractual liability for reim-
204 bursement of the amount of the tax or an economic adjustment of prices for services rendered, to include the approximate amount of the tax, will make the United States a "taxpayer." Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14; James v. Dravo Contracting Co., 302 U. S. 134. But where, as here, the law itself has a fixed policy of taxing the owner and extends a legal right of action, even in the absence of a contract or a price adjustment, the person against whom the right of action is extended must be considered the taxpayer. Colorado Bank v. Bedford, supra; Federal Land Bank v. Bismarck Co., 314 U. S. 95; Blauner's Inc. v. City of Philadelphia, 198 Atl. 889.

In Bemis vs Shipe, 26 Pa. Super. Ct. 42, cited in this Court's opinion, it was said that property belonging to one other than the owner of the land should be included in the assessment of the land to make assessments uniform, in compliance with Section 1, Article IX, of the Pennsylvania Constitution. The court said that it could hardly be conceived that the legislature should intend to exempt from taxation a building upon one tract of land, because it happened to be erected upon a leasehold, under a concession of the right to remove it upon the termination of the lease, and to impose a tax upon a precisely similar building upon a adjoining tract, because it was erected by the owner. With respect to private property the conception may seem unsound. But with respect to public property, the property of all the States, it is the only sound view. The section of the Constitution referred to also provides that the General Assembly may exempt from taxation public property used for public purposes. Though the
205 Legislature has not provided an exemption in this instance, this Court recognizes that an exemption of property belonging to the United States is inherent in the Federal Constitution, and it should not be presumed that the Legislature of Pennsylvania intended to enact a statute in disregard of the constitutional exemption.

Kittanning Academy v. Kittanning Boro., 8 Pa. Super. Ct. 27, also cited by this Court, is not controlling. It held that a dwelling

house and property leased by a corporation for school purposes did not exempt the property from assessment against the owner of the real estate, notwithstanding a statutory exemption of the school property. There the ownership of the property was controlling. It was not the property of the school itself, but was the property of a private corporation. Here Mesta Machine Company did not own the property and held it only for the execution of a public purpose.

In County of Franklin v. McClean, 93 Pa. Super. Ct. 165, a leasehold interest in state lands was held to be taxable to the lessee under the statute here in question, but in that case there was no question of the Federal Constitution involved, and there was no reason to suppose that the Legislature did not intend to tax the interest of McClean. Moreover, the property assessed was not being devoted to a public purpose.

Petitioners submit that the rule expressed in the cases already cited, and in Guthrie v. Pittsburgh Dry Goods Co., 47 Pa. Super. Ct. 384, that the ownership of property is a subordinate matter in the preparation of assessments, is to be applied only to private property. The ownership of public property is a primary matter in questions of taxation and should not be disregarded.

2. The second point upon which petitioners request a reargument is whether the statute would be valid under the Constitution if it does purport to authorize the assessment of property belonging to the United States, merely because the assessment was made against Mesta Machine Company. The question was an-
206 swered in the affirmative. This Court recognized the well-established rule that property held by the United States is beyond the pale of taxation by a state, or its political subdivisions, except by Congressional consent, citing Van Brocklin v. State of Tennessee, 117 U. S. 151; Irwin v. Wright, 258 U. S. 219, and Clallam County v. United States, 263 U. S. 341. The Court then said that these authorities are not applicable because the assessment is not made against the Government but against an independent contractor.

But an examination of all of the cases cited by the Court, and numerous others cited in petitioner's briefs, holding invalid assessments of Government property will show that in all of them except Clallam County v. United States, supra, the assessment was made against private individuals. The rule of the Van Brocklin case is not made to depend upon whether the tax is assessed against the United States or against a private individual, nor upon which is in possession. And, as pointed out by the dissenting Justices, the cases which permit an assessment against property of an independent contractor sustain assessments on property owned not by the United States, but by the contractor.

See, for example, Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375. The right to tax exists only after title passes, Fox Film Corp. v. Doyal, 286 U. S. 123, except where the situation is such that in equity title should have been transferred. There the Supreme Court in exercise of equity powers may treat as done what should have been done, and regard the situation as one where title has passed. New Brunswick v. United States, 276 U. S. 547. There is no case where an assessment of property, title to which was in the United States, has been sustained, whether the assessment was made against the United States or against one of its instrumentalities, or against a private individual.

The fact that Mesta Machine Company has a leasehold interest in the machinery, and that it is located on Mesta's land, is not sufficient to render the property taxable. This is demonstrated by Helvering v. Producers Corp., 303 U. S. 376. With two
207 Justices dissenting that case upheld a federal tax upon the income derived by a corporation from a lease of state lands, but in the majority opinion Chief Justice Hughes pointed out (pp. 384–385) that the tax was sustained only as to income as distinguished from a tax upon the leases themselves or the Government's property. And it should be noted that the Court was speaking of a tax assessed not against the State but against the lessee of state lands. The present case goes beyond the limitations there defined. It does not impose a tax upon the income derived by Mesta Machine Company from its use of federal property, but imposes a tax upon the property itself.

Petitioners believe the decision of this Court was influenced to some degree by a misapprehension of the effect of Penn Dairies v. Milk Control Commission, 318 U. S. 261. The opinion filed May 12, 1943, quoted language from the opinion in that case to the effect that the trend of the decisions of the Supreme Court is not to extend governmental immunity from state taxation and regulation beyond the national Government itself, and governmental functions performed by its officers and agents. But that language referring to extensions of governmental immunity from state regulation nowhere implied an abrogation of existing rules of immunity of Government property from state taxation. Your petitioners request no extension of any rule of immunity. They urge only that assessments of Government property to private individuals have repeatedly been held invalid and should be held so in this instance.

The Penn Dairies case concerned the regulation of a Pennsylvania corporation, not taxation of Government-owned property. A more apposite authority is Pacific Coast Dairy v. Department of Agriculture, 318 U. S. 285. There the Court said (p. 295):

"The court below points out that the statute regulates only
208 the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price—not the sale of Moffett Field—which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders. We think, however, that it is without application here, because of the authority granted the federal government over Moffett Field.

"In the light of the history of the legislation, we are constrained to find that the true purpose was to punish California's own citizens for doing in exclusively federal territory what by the law of the United States was there lawful, under the guise of penalizing preparatory conduct occurring in the State,—to punish the appellant for a transaction carried on under sovereignty conferred by Art. 1, § 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause."

In the present case it is said that Allegheny County is only taxing a local and private corporation and is not disabled from including Government property in the assessment merely because the United States has contracted to pay the tax. But the facts clearly show an attempt to tax Government property by "treating" it as Mesta's—and by ignoring the liability of the Government to pay the tax irrespective of contract.

The Penn Dairies case was based to a large extent upon a finding that Congress, by enacting several statutes designed to fix prices and wages, has demonstrated an interest in the preservation of public health equal to its interest in securing the lowest possible prices for federal purchases. There is no room for such implications with respect to the present assessment. To the contrary is the history of Senate Bill 2308. That bill, a copy of which is attached hereto, provided that all real property acquired or purchased by the United States for military purposes, including property acquired for manufacture of munitions, together with improvements on any such property, at the time it is acquired "shall remain subject to taxation" by the state and political subdivision in which it was located to the same extent as other real
property. It was evidently intended to relieve counties
209 and localities in which the Government had purchased huge tracts of land, thus removing substantial sources of revenue from the local tax rolls. The bill was referred to the Committee on Public Lands of the House on July 6, 1942, and died there, apparently without efforts for revival. Thus Congress has refused to permit taxation of federal property which was once a source

of revenue and in spite of the fact that in many instances its removal may work considerable hardship on local governmental units. Certainly there is here no implication of congressional consent to state taxation. Any implication is toward the opposite.

It is suggested in the opinion of this Court that the abatement of the present assessment is not to the relief of the United States, but is for the relief of Mesta Machine Company, and that the property in question is being used by Mesta for a private purpose for its own profit. The interest of the United States is completely ignored, although the record shows that the Government has placed this property in the possession of Mesta Machine Company for use in performance in one of the Government's most vital public functions—the provision for national defense and preservation of the nation. In any period of emergency like the present one where the Federal Government is called upon to expand its activitjes, it has been found essential and more expeditious to utilize all existing facilities and to employ the services of private persons and corporations to operate federal property. Accordingly, the property must be put into the possession of private persons for operation, or maximum performance of governmental obligations cannot be achieved. The immunity of the United States from taxing power of the states would be devitalized if it were limited to taxes assessed against the United States itself. If the states are free to tax the property of the United States while it is thus being operated by private persons, the personal immunity of the United States would become an empty privilege.

As the record discloses, the United States is now paying, under the terms of its contract, all the real estate taxes of Mesta
210 Machine Company on the Company's property, and it is thus bearing an expense which it could avoid entirely by condemnation or by purchase. Moreover, the building owned by Mesta in which the Government's property is situated was erected for the purposes of performance of this contract (R. 44a) and upon this the County of Allegheny is collecting taxes from Mesta Machine Company, which also are indirectly borne by the United States under its contract. Thus, it appears that the County of Allegheny is receiving indirectly from the United States not only the same amount of tax revenue which it received from Mesta alone before the inception of its contract, but also revenue upon the new building which would not have been erected in absence of the contract. After the termination of the contract the building on Mesta's land will remain taxable. Under such circumstances it is not apparent to petitioners that the United States is not bearing a proper share of the burden of local taxation merely because it protests the assessment of property which is its own and was

acquired by it only for the highest governmental purpose and will remain its own after the cessation of hostilities.

PRAYER

For the reasons above, petitioners pray that an order be entered granting a reargument in this case and that the judgment entered herein on May 12, 1943, be reversed. If this motion for reargument is denied petitioners pray that an order be entered directing the Prothonotary of this Court to hold the record in this case for the period of three months during which your petitioners have a right to file a petition for the allowance of an appeal to the Supreme Court of the United States as provided by law.

UNITED STATES OF AMERICA,
By Samuel O. Clark, Jr.,
Assistant Attorney General.
Charles F. Uhl,
United States Attorney.
MESTA MACHINE COMPANY,
By *Reed, Smith, Shaw & McClay,*
Its attorneys.

211 Service of notice of the within application accepted, and a copy of such application received, this 21st day of July 1943.

H. M. MONTGOMERY,
Asst. County Solicitor for County of Allegheny.

212 S 2308

77TH CONGRESS
2D SESSION

In the Senate of The United States

February 24 (legislative day, February 13), 1942

Mr. McNary introduced the following bill; which was read twice and referred to the Committee on Agriculture and Forestry:

A BILL

Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all real property in the continental United States which is hereafter acquired by purchase, condemnation, or otherwise, by or on behalf of the United States, for general military purposes (including prop-

erty acquired for, or for use in connection with, fortifications, coast defenses, military camps, cantonments, proving grounds, training areas, bomb testing areas, and the manufacture of munitions), together with the improvements on any such real
213 property at the time such property is so acquired, shall remain subject to taxation by the State and political subdivision in which such property is located, to the same extent, according to its value, as other real property is taxed.

SEC. 2. The provisions of this Act shall not apply to any property with respect to which such power of taxation is waived in accordance with State law by the State or political subdivision in which such property is located. Any property covered by any such waiver shall not thereafter be subject to such taxation by the State or political subdivision, as the case may be, so long as such property is held by or on behalf of the United States.

S 2308

77TH CONGRESS
2D SESSION

A BILL

Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes

By Mr. MCNARY

February 24 (legislative day, February 13), 1942.
Read twice and referred to the Commission on Agriculture and Forestry.
[File endorsement omitted.]

In the Supreme Court of Pennsylvania

Order refusing petition for reargument

AUG. 12.43.

Petition for reargument refused.
Per Curiam.

215 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Petition for allowance of appeal to the Supreme Court of the United States

Filed Sept. 9, 1943

The United States of America and Mesta Machine Company, petitioners herein, respectfully state that on May 12, 1943, this Court entered a judgment against them reversing the judgment of the Court of Common Pleas of Allegheny County, that a motion for reargument was filed on July 21, 1943, and that said motion was denied on August 12, 1943.

Petitioners, believing that the judgment of this Court is incorrect, pray that they may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this Court, and that a transcript of the record in this cause, duly authenticated, shall be sent to the Supreme Court of the United States.

Petitioners submit and present to the Court herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause in compliance with Rule 86 of this Court and Rule 12 of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
By SAMUEL O. CLARK, Jr.
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.
MESTA MACHINE COMPANY
By REED, SMITH, SHAW & McCLAY,
Its attorneys.

SEPTEMBER 9, 1943.

[File endorsement omitted.]

216 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Assignment of Errors

Filed Sept. 9, 1943

The Court erred:

1. In holding that the Act of May 22, 1933, P. L. 853, Art. II. including Sec. 201 thereof, as amended by the Act of July 2, 1941.

P. L. 219, Sec. 1, is constitutional insofar as it purports to authorize the assessment to Mesta Machine Company of property owned by the United States.

2. In holding that the assessment of Government-owned machinery as a part of the real estate of Mesta Machine Company is not in violation of, or repugnant to, the Constitution of the United States.

3. In holding that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was irrelevant, and therefore incompetent and inadmissible.

4. In failing to hold that the Act of May 22, 1933, P. L. 853, Art. II, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is unconstitutional as applied to property belonging to the United States.

5. In failing to hold that the assessment of Government-owned machinery to Mesta Machine Company was in violation of, and repugnant to, the Constitution of the United States, and therefore invalid and void.

217 6. In failing to hold that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was relevant and competent and properly admitted by the Court of Common Pleas of Allegheny County.

7. In reversing the judgment of the Court of Common Pleas of Allegheny County.

8. In restoring and affirming the assessment of Government-owned machinery to Mesta Machine Company.

THE UNITED STATES OF AMERICA,
By SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.
MESTA MACHINE COMPANY,
By REED, SMITH, SHAW & MCCLAY,
Its attorneys.

[File endorsement omitted.]

218 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Order allowing appeal

Filed Sept. 15, 1943

The appellants in the above-entitled suit, Mesta Machine Company, and the United States of America, Intervenor, and both of

them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania on the 12th day of May 1943, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Pennsylvania shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

Dated September 15, 1943.

GEORGE W. MAXEY,
Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

219 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Stipulation designating the parts of the record to be included in the transcript on appeal to the Supreme Court of the United States

It is hereby stipulated and agreed between attorneys for Mesta Machine Company, attorneys for the United States of America, and attorneys for the County of Allegheny, that the record on appeal to the Supreme Court of the United States in this cause shall consist of the entire proceedings before the Supreme Court of Pennsylvania including:

1. The entire record on appeal to the Supreme Court of Pennsylvania from the Court of Common Pleas of Allegheny County, Pennsylvania, as printed and used in the argument in the Supreme Court of Pennsylvania in this case.

2. The assignments of error made by the County of Allegheny on appeal to the Supreme Court of Pennsylvania from the Court of Common Pleas of Allegheny County, Pennsylvania.

3. The docket entries of the Supreme Court of Pennsylvania.

4. The opinion of the Supreme Court of Pennsylvania filed herein on May 12, 1943.

5. The dissenting opinion filed by Justices Horace Stern and Allen M. Stearne herein on May 12, 1943.

6. The petition for supplemental certiorari and for additional time within which to file a petition for reargument, filed on May 27, 1943, the order allowing same, and the supplemental certiorari issued pursuant to said order, on June 4, 1943.

220 7. The petition for further extension of time within which to file a motion for reargument, etc., filed on June 22, 1943, and the order allowing same.

8. The motion for reargument before the Supreme Court of Pennsylvania, filed July 21, 1943, and the order of Court denying the same, dated August 12, 1943.

9. The petition for allowance of appeal to the Supreme Court of the United States.

10. The jurisdictional statement filed by Mesta Machine Company and the United States, including the copy of the opinion and judgment of the Supreme Court of Pennsylvania thereto appended, and including also the copy of the dissenting opinion thereto appended.

11. Assignments of error on appeal to the Supreme Court of the United States, filed by Mesta Machine Company and the United States.

12. The order of the Supreme Court of Pennsylvania allowing an appeal to the Supreme Court of the United States.

13. The statement opposing jurisdiction and motion to dismiss or affirm, filed by County of Allegheny.

14. This stipulation.

United States of America, By Samuel O. Clark, Jr., Samuel O. Clark, Jr., per E. W. M., Assistant Attorney General; Charles F. Uhl, Charles F. Uhl, per E. W. M., United States Attorney; Mesta Machine Company, By Elder W. Marshall, its attorney; County of Allegheny, By Walter P. Smart, Walter P. Smart, County Solicitor; Edward G. Bothwell, Edward G. Bothwell, Assistant County Solicitor.

221 [Bond on Appeal for $250.00 approved and filed Sept. 29, 1943, omitted in printing.]

224 [Clerk's certificate to foregoing transcript omitted in printing.]

226 [Citation in usual form showing service on Walter P. Smart, et al, omitted in printing.]

227 In the Supreme Court of the United States

Statement of points relied upon

Filed Oct. 8, 1943.

Pursuant to Rule 13, Paragraph 9, of this Court, the appellants state that they intend to rely upon all of the points in their Assignment of Errors.

UNITED STATES OF AMERICA,
CHARLES FAHY,
Solicitor General.

By SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorneys General.
CHAS. F. UHL,
Charles F. Uhl.
United States Attorney.

MESTA MACHINE COMPANY,
By REED, SMITH, SHAW & MCCLAY,
Reed, Smith, Shaw & McClay,
Its Attorneys.

Receipt of a copy of the foregoing statement of points relied upon is acknowledged this 18th day of September 1943.

WALTER P. SMART,
County Solicitor.

228 In the Supreme Court of the United States

Designation of the portions of the record necessary for consideration of the points relied upon

Filed Oct. 13, 1943

Pursuant to Rule 13, Paragraph 9, of this Court, the appellants designate the entire transcript on appeal as necessary for the consideration of the points relied upon.

UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorney General.

MESTA MACHINE COMPANY,
By EDWIN MARSHALL,
REED, SMITH, SHAW & MCCLAY,
Reed, Smith, Shaw & McClay,
Its Attorneys.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing designation is acknowledged this 11th day of October 1943.

COUNTY OF ALLEGHENY,
By EDWARD G. BOTHWELL,
Edward G. Bothwell,
Ass't County Solicitor.

229 Supreme Court of the United States

Order postponing further consideration of the question of jurisdiction

October 25, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

[Endorsement on cover:] File No. 47910. Pennsylvania Supreme Court. Term No. 417. The United States of America and Mesta Machine Company, Appellants vs. County of Allegheny, Pennsylvania. Filed October 8, 1943. Term No. 417 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE, 1943